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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 MARK I. SOKOLOW, ET AL.,

4 Plaintiffs,

5 v.

04 CV 397 (GBD)
Videoconference
Oral Argument

6 PALESTINE LIBERATION ORGANIZATION,
7 ET AL.,

8 Defendants.

9 -----x

New York, N.Y.
May 19, 2021
10:33 a.m.

11 Before:

12 HON. GEORGE B. DANIELS,

District Judge

14 APPEARANCES VIA VIDEOCONFERENCE

15 ARNOLD & PORTER, LLP
16 Attorneys for Plaintiffs
17 BY: KENT A. YALOWITZ

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1 (The Court and all parties appearing via
2 videoconference)

3 THE COURT: Good morning, everyone.

4 MR. BERGER: Good morning, your Honor.

5 THE COURT: I guess let's start with Mr. Yalowitz.
6 Are you going to argue for your motion?

7 MR. YALOWITZ: Sure. Thank you, your Honor. I'd be
8 glad to lead off. First of all, I'm very glad to see you
9 again. I'm sorry it's not in person.

10 I'd like to cover three topics. I'm happy to just
11 talk or answer questions. I just want to be as helpful as I
12 can to the Court, but the topics that I think are at issue
13 based, on the Second Circuit's limited mandate, are: No. 1 is
14 the PSJVTa applicable to this case; and No. 2, if it is, any
15 issues, any legal issues, related to the applicability,
16 including the constitutionality of the statute.

17 So I would cover, No. 1, the applicability; and No. 2,
18 the due process clause issues that the defendants are arguing;
19 and No. 3, the separation of powers issues that the defendants
20 are arguing, if that's okay with the Court.

21 THE COURT: Sure. That will be helpful.

22 MR. YALOWITZ: Okay, great. So as the Court is aware,
23 as we have learned together, there are two prongs to the
24 revised section 18, U.S.C., Section 2334(e). The first prong
25 is what's known as pay-for-slay, and the second prong is the

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1 U.S. activities. The plaintiffs came with a showing that there
2 were 178 either convicted or killed individuals, who were
3 convicted for or killed while perpetrating terror attacks that
4 injured or killed U.S. citizens.

5 The statute says if those such individuals are paid
6 after April of 2020, that will be deemed to be consent. We
7 came with evidence, No. 1, that there was a bureaucratic system
8 of making those payments; No. 2, that the defendants made
9 numerous admissions by officers speaking in the scope of their
10 authority that they were, in fact, continuing to make those
11 payments; and No. 3, U.S. government reports stating that
12 investigations conducted or pursuant to law or under a duty to
13 report, the fruits of those investigations indicated that the
14 payments were continuing to be made.

15 The defendants had an opportunity to contest the 178
16 individuals, and they elected not to. And, in essence, we're
17 on what could be deemed a summary judgment standard. We're not
18 at the pleadings stage. It's my burden to show by a
19 preponderance of the evidence that the statute is being met. I
20 came with that evidence, and the defendants had the opportunity
21 to contest it. Electing not to contest it, those facts should
22 be found by the Court.

23 THE COURT: Well, let me focus a little bit in terms
24 of the way I've read the papers. It seems to me that with
25 regard to the payments, that there doesn't seem to be either a

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1 genuine factual dispute as to what's occurring presently, and
2 that doesn't seem to be their primary argument against that
3 portion, saying that the facts don't match the statute.

4 With regard to the U.S. activities, that's a different
5 argument. They say, well, look, with regard to the payments to
6 individuals, our argument is more so a due process
7 constitutional argument slash a -- well, it's technically
8 articulating it as a forced consent. Is there really any such
9 thing as a forced consent? You know, you either consent or you
10 don't. You either want to tell us that what we do is
11 appropriate for asserting jurisdiction over us, or you tell us
12 it's not.

13 You don't tell us whether we agree to it because we're
14 not agreeing to it, and we're only going to be dragged into
15 court if you say that you have authority to drag us into court.
16 And we're not going to consent to show up unless you force us
17 to do so.

18 And now with regard to the second prong, they are
19 genuinely disputing or directly disputing whether or not the
20 requirements of the statute itself, putting aside
21 constitutionality, requirements of the statute have actually
22 been met that, you know, that's an analysis of what UN
23 activities are going on, what other ancillary UN activities are
24 going on, and whether or not there are other activities that
25 could be characterized as not related to UN activity that can

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1 be a basis for jurisdiction. That's more of a factual
2 analysis.

3 But it seems to me that you don't need both. You need
4 one.

5 MR. YALOWITZ: Right.

6 THE COURT: And so it seems to me that the more
7 important analysis is whether or not if you have one or the
8 other, whether or not that's consistent with the due process
9 clause of the Fifth Amendment, and whether or not I have
10 precedent to say that even if, under a general analysis, the
11 current general analysis that the Supreme Court has given us
12 and the Second Circuit has given us as to how to analyze due
13 process and particularly due process contact, that should be
14 sufficient for someone to reasonably expect that they'd be
15 hauled into court.

16 Whether or not saying to someone, well, we know you
17 really didn't agree to this, but we're going to deem you to
18 have agreed to it for the purpose of jurisdiction. We're not
19 going to say it really is jurisdiction. We're going to say it
20 really is your consent to jurisdiction and whether or not
21 that's consistent with the due process constitutional analysis.

22 I mean, one example that I might give, and you can
23 address is, well, would it be sufficient for a state or a
24 jurisdiction to say, well, if you were in New York last week
25 and then you have a car accident this week in New Jersey,

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1 whether or not we can say that your having been in New York
2 last week, unrelated to this car accident, is either consistent
3 with due process or it is consistent with us being able to say
4 that we gave you fair notice of that, and you came to New York,
5 you were in New Jersey and you had an accident; so you
6 shouldn't have come to New York the week before. So even
7 though it has nothing to do with the accident, we have the
8 authority to say you consented because you were in New York the
9 week before.

10 So I mean, are we genuinely talking about consent
11 here, or are we really talking about an assertion of
12 jurisdiction over a party's objection, even though they don't
13 have the contact that the Supreme Court and the Second Circuit
14 has now relied upon as being sufficient with due process? Can
15 we simply manufacture consent and articulate in a way that that
16 consistent with due process?

17 MR. YALOWITZ: Okay. So here's how I like to think
18 about it. I think that the due process clause, or at least the
19 due process clause of the 14th Amendment, does work for three
20 things, and the Fifth Amendment does at least two.

21 So, first of all, as you say, Judge, fair notice. You
22 have to have fair notice. You can't have like gotcha. You
23 can't have, you know, we didn't -- well, we secretly decided
24 that the law was going to apply to you in some way.

25 No, it has to be clear, direct. You have to have

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1 actual notice or at least fair notice. There's no question
2 that fair notice exists here. There's no argument that they
3 were unaware of the statute. There was no argument that they
4 were not aware of how it was going to work. Fair notice,
5 there's no dispute.

6 Second --

7 THE COURT: Before you go to the second point --

8 MR. YALOWITZ: Yes.

9 THE COURT: -- because it is partially unclear to me
10 what is the relief that you're asking for. Because when you
11 talk about fair notice, you know, are you talking about for the
12 original lawsuit, for reviving the original lawsuit, or for a
13 new lawsuit?

14 MR. YALOWITZ: So first of all, it's for any lawsuit
15 that is pending, and the new lawsuit is definitely pending.
16 There's no question about that.

17 THE COURT: Right. Fair notice -- yes, I understand
18 that.

19 MR. YALOWITZ: The old lawsuit, whether it's pending
20 or not depends on what the Second Circuit decides to do.
21 They've held that question in abeyance.

22 THE COURT: Right.

23 MR. YALOWITZ: So if they decide to reopen it because
24 it's judicially efficient to reopen it, there's a societal cost
25 to making everybody retry the case, there's a judicial cost,

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1 juries, witnesses, third parties, resources. If they say, the
2 judiciary says, in its discretion that we're going to reopen
3 the case, then the case is pending, the old case is pending,
4 consent applies. But if they don't reopen the case, then you
5 can't -- Congress can't force the judiciary to reopen a case.
6 That's up to the Second Circuit and Supreme Court.

7 THE COURT: Well, why would fair notice apply to the
8 claims that were brought back in 2004?

9 MR. YALOWITZ: Yes, so the defendants were well aware
10 that these claims existed. They knew that there was a new
11 lawsuit on file. They knew that there was a pending motion to
12 reopen the old case. So in the circumstances of this case,
13 there's no question they had fair notice.

14 THE COURT: I didn't follow that because fair notice
15 of what? They did not have fair notice of their potential
16 liability under the statute at anytime prior to the statute
17 being enacted.

18 MR. YALOWITZ: Well, right, but they had fair notice
19 on the day the statute was enacted.

20 THE COURT: Well --

21 MR. YALOWITZ: And if they did the conduct that the
22 statute indicate, that they would be subject to personal
23 jurisdiction for these claims either in the new case, without
24 question, or in the old case, if the courts granted the motion
25 to recall the mandate. The day the statute was passed, they

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1 knew that, or at least when they got notice of the statute.

2 THE COURT: From your prospective, is it relevant for
3 me to analyze what it is that they had fair notice of? I mean,
4 when they had fair notice? Put aside the new case because
5 we're not addressing the new case here.

6 MR. YALOWITZ: Right. They haven't contested it. I
7 mean, for the sake of good order, if the Court wanted to
8 assess -- you know, they received actual notice of the statute
9 at least December 2019.

10 And if you look at what was there -- what did they
11 understand the consequences would be? So whatever it was,
12 December 26th, 2019, they get a copy of the statute in a letter
13 from opposing counsel, and what do they understand the
14 consequences are going to be? They know that there's a pending
15 petition for certiorari appealing the denial of the motion to
16 recall the mandate, and if they engaged in the conduct, then
17 they're going to be subject to the statute.

18 And, in fact, there's then a litigation in the U.S.
19 Supreme Court about this very issue, and they say to the
20 Supreme Court of the United States, well, you shouldn't grant
21 the petition because we don't know whether we're going to get
22 engaged in this conduct. That's something that's going to
23 develop in the future, and we don't know, nobody knows, and
24 until somebody knows, then you shouldn't grant the petition.

25 THE COURT: So you're not asking me to ultimately rule

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1 on whether or not the prior judgment should be reinstated, or
2 whether or not this case should be tried again?

3 MR. YALOWITZ: I think you might have an opinion on
4 that, but I don't think that's within the scope of the remand.

5 THE COURT: Okay.

6 MR. YALOWITZ: I mean, you could -- I don't think that
7 that's within the scope of what they're asking here.

8 THE COURT: Okay. So practically, what are you asking
9 me to do, and where do you think the case should go from there?

10 MR. YALOWITZ: Sure. So I think you should -- and I
11 want to come back to the due process issue.

12 THE COURT: Sure.

13 MR. YALOWITZ: But I think you -- I would expect to
14 see an opinion from you that answers sort of three questions:
15 No. 1, does the statute apply as of -- you know. Based on
16 findings of facts and conclusions of law, you know, here are
17 the undisputed facts and these facts -- you know, these facts
18 meet the statute, these facts don't meet the statute. Whatever
19 your judgment is based on, No. 1, the questions of fact and
20 No. 2, the conclusions of law. That's No. 1.

21 No. 2, is the due process clause violated by this
22 statute, assuming that it applies. And I think there's, you
23 know, basic agreement that it applies in some fashion.

24 And No. 3 is the separation of powers violated as a
25 result of the application of the statute to this case.

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1 So that's what -- and then, you know, it's like you're
2 not -- nobody's asking you to make an order. It's like a
3 memorandum decision or something. I mean, it's a little weird
4 because normally on a remand, you know, the Court is supposed
5 to take some action, but I think really what they're looking
6 for is some findings of fact and conclusions of law.

7 Okay. So I want to come back to sort of three buckets
8 of the due process clause. Bucket No. 2 we talked about, fair
9 notice. Bucket No. 2 is arbitrary government action. That's
10 as old as the Magna Carta. Due process says you can't be
11 arbitrary if you're the government.

12 So what does that look like? If Congress passes a law
13 that says, you know, anybody who crosses a river, you know, the
14 Rubicon in Italy, is subject to jurisdiction of the Western
15 District of Oklahoma, I would say, okay, well, what is that
16 doing? Like, why would they do that? That just seems
17 arbitrary. What's the legitimate government interest, and how
18 is it related to putting people in the Western District of
19 Oklahoma? It makes no sense.

20 It's the same thing with the hypothetical that you
21 had. You know, you're in New York on Tuesday, and you got in a
22 car accident in New Jersey a week later, how does that help the
23 State of New York? Nobody from New York is injured. It didn't
24 happen in New York. It's an arbitrary -- it feels to me
25 arbitrary, and that's where the -- you know, all those state

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1 registration statutes are going off on these two issues, fair
2 warning and arbitrary.

3 They say, first of all, like if you look at -- I'm
4 sure you have, but when you look back again at the *Brown*
5 *against Lockheed* case, Judge Carney is saying, look, I'm really
6 worried because you've got some routine bureaucratic thing that
7 nobody -- you know, they fill out a form, nobody knows that
8 there's going to be any consequence to it, and all of a sudden,
9 you're subject to general jurisdiction. That's not fair
10 warning, No. 2.

11 And No. 2, it's hard for me to see a legitimate
12 interest in the State of Connecticut to adjudicate a dispute
13 between people from Georgia, an accident that happened in
14 Georgia, with a corporation headquartered, you know, in some
15 other place and incorporated some other place. Where's the
16 legitimate interest of Connecticut, other than they want to
17 give extra employment to plaintiffs' lawyers? Maybe that's an
18 interest, but they don't say that.

19 THE COURT: Well, let me change the hypothetical,
20 though. Let's say New York decided that they wanted to write a
21 law that says you have consented to be sued in New York if you
22 engage in an accident in any state and a New Yorker is injured.

23 MR. YALOWITZ: Yes.

24 THE COURT: How would that analysis be different?

25 MR. YALOWITZ: So --

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(Indiscernible crosstalk)

THE COURT: -- closer analogy to this. And I get into an accident in Wyoming, the person turns out to be a New York resident, and New York says -- and they don't say that that gives us jurisdiction. They say that constitutes your consent to jurisdiction.

MR. YALOWITZ: Yes.

THE COURT: How would that be different?

MR. YALOWITZ: So I don't think that statute is constitution, that hypothetical.

THE COURT: How is that different than what we have here? That's what I'm trying to find out.

MR. YALOWITZ: So first of all, I think -- I have some questions about whether that's actually consent. I mean, an accident is an unintentional act, but suppose the statute said if you intentionally hurt someone --

THE COURT: Let's say it's robbery. Yes, the statute says if you injure -- if you commit a crime in which a New Yorker is injured, we consider that to be consent to be sued in New York, even if you robbed a bank in California and shot the bank teller.

MR. YALOWITZ: Right.

THE COURT: So why would that constitute consent?

MR. YALOWITZ: Yes. So I think that the problem with that statute is the third bucket of the due process clause,

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1 which is minimum contacts. And we know, I mean, short of -- we
2 know from *Walden against Fiore* that that statute doesn't fly
3 under U.S. Supreme Court law because that was the case with the
4 people from California or Nevada, or from Nevada and they were
5 in Georgia and they got -- you know, they got their money
6 confiscated. They were gambling and they got their money
7 confiscated by law enforcement people in Georgia, and they sued
8 in Nevada. And the Supreme Court said, well, just because you
9 hurt somebody from Nevada, that's not good enough.

10 THE COURT: But the corresponding statute doesn't
11 require any U.S. forum.

12 MR. YALOWITZ: Right, right. And so the question
13 is -- I mean, this is the question in the case. Do you have to
14 have minimum contacts in order to -- does a federal statute
15 require minimum contacts or else it's unconstitutional?

16 We know that the State is bound by federalism in ways
17 that the federal government is not. We know that federalism,
18 that's -- like, *Bristol Myers* says that and *Worldwide*
19 *Volkswagen* says that, that the State -- there are certain
20 things that the State, like a nation could do, but a state in
21 the United States can't do because of federalism.

22 And we know that there's a lot of statutes on the
23 books that say if you kill an American or if you hurt an
24 American overseas, if you do things that are bad for U.S.
25 citizens overseas, you're subject to U.S. jurisdiction. You

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1 know, they rendition people, they extradite people, and the
2 defense is, well, I didn't know that it was an American or, you
3 know, I wasn't directing my activities at U.S. soil. And the
4 answer is, well, you don't have to have minimum contacts
5 against the United States.

6 THE COURT: Except the difference here is that that's
7 not what the statute -- the difference here --

8 (Interruption)

9 I'm sorry, we are getting background noise. Somebody
10 has to mute.

11 (Pause)

12 Do we know who that is? Does anybody recognize that
13 phone number that's ending 2801? You have to mute your phone.

14 What was I getting ready to say?

15 MR. YALOWITZ: I think we're back.

16 THE COURT: So, I had a specific question. I'm sorry,
17 what where were we?

18 MR. YALOWITZ: So we were talking about why is the
19 federal government different from the State governments, and
20 the answer is, with consent, you don't need minimum contacts.

21 THE COURT: Well, see, that's the difference. That's
22 what I was going to ask you about, because this is not a
23 question of whether or not there's sufficient minimum contact
24 to assert jurisdiction over the defendant. It is a question of
25 whether or not it constitutes consent.

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1 MR. YALOWITZ: Right.

2 THE COURT: Consent doesn't require any kind of
3 contact.

4 MR. YALOWITZ: Right, right.

5 THE COURT: And there's no rule that I can write that
6 says, okay, consent with contact is better or different than
7 consent without contact.

8 MR. YALOWITZ: Right.

9 THE COURT: So I don't see why -- unless you can
10 explain to me why, I don't see why a minimum contact test is
11 the test for consent.

12 MR. YALOWITZ: I agree with that. I a hundred percent
13 agree with that. I think federalism limits the States in ways
14 it doesn't limit the United States.

15 THE COURT: So you think that the United States can
16 assert jurisdiction, consistent with constitutional principles
17 can set jurisdiction over defendants who have absolutely no
18 contact with the United States?

19 MR. YALOWITZ: Correct.

20 THE COURT: On the basis of saying that certain
21 activity constitutes appropriate jurisdiction, or on the basis
22 of saying if you do certain things, that's implied consent?

23 MR. YALOWITZ: I'm sorry, I just missed the first
24 part, Judge.

25 THE COURT: Whether or not engaging in certain

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1 activity constitutes jurisdiction --

2 MR. YALOWITZ: Right.

3 THE COURT: -- as opposed to engaging in certain
4 activity --

5 MR. YALOWITZ: Is deemed to be consent.

6 THE COURT: -- is deemed to be implied consent.

7 MR. YALOWITZ: Right. It's law of the case that what
8 they did to these people does not meet minimum contacts.

9 THE COURT: Okay.

10 MR. YALOWITZ: I disagree with that, but unless the
11 Supreme Court says otherwise, that's law of the case.

12 THE COURT: Okay. That's what I was trying to figure
13 out, whether or not you were arguing that. Go ahead.

14 MR. YALOWITZ: So it is post-enactment conduct. If
15 it's voluntarily and knowing, fair warning, volitional, then
16 the Congress has the power to say, okay, based on our foreign
17 policy powers, our power to control -- our plenary power to
18 control the jurisdiction of the judicial branch, we have
19 constitutional power to do that, unless there's some clause of
20 the constitution that says they can't, like, you know, it's an
21 ex post facto or Eighth Amendment violation or something like
22 that.

23 So the question is, is there something in the due
24 process clause that says if you -- that minimum contacts is
25 required for consent, and the answer is no.

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1 THE COURT: No. Okay. But you're not arguing that
2 Congress has the authority to change what constitutionally
3 constitutes jurisdiction as laid out by the Supreme Court?

4 MR. YALOWITZ: That Congress does not have that power.

5 THE COURT: Okay. So Congress --

6 MR. YALOWITZ: Congress may think they have that
7 power, but the courts will not respect it.

8 THE COURT: From my perspective, that means they don't
9 have it.

10 So what gives them the power to do, through consent,
11 which is not -- well, to do through -- and I will phrase it,
12 through implied consent what they could not do directly?

13 MR. YALOWITZ: That is a necessary and proper -- it's
14 a necessary and proper incident of their foreign policy powers,
15 of their power to control plenary jurisdiction, and so as long
16 as it's volitional, fair warning, not arbitrary, it's not
17 unconstitutional.

18 THE COURT: I'm not sure that that's the analysis. As
19 long as it's all those things, it may be within their power to
20 do so, but that doesn't end the constitutional analysis. The
21 constitutional analysis is still a due process one.

22 MR. YALOWITZ: Right. And as I say, there's three
23 buckets to the due process.

24 THE COURT: Right.

25 MR. YALOWITZ: Bucket No. 1 is do they have fair

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1 warning, you know, volitional conduct? Bucket No. 2, is it
2 rationally related to a legitimate government interest? Bucket
3 No. 3, do you have to have minimum contacts?

4 And my position, which I think is the Supreme Court's
5 position, is you do not have to have minimum contacts in order
6 to deem somebody to consent.

7 THE COURT: I mean, I don't think that that's an
8 unusual principle. I mean, obviously, if you and I sign a
9 contract, and I consent to being sued in New York, even though
10 my company is in China, I don't have to have any contacts with
11 New York --

12 MR. YALOWITZ: That's right.

13 THE COURT: -- to enforce that agreement because I
14 consented.

15 MR. YALOWITZ: Right. As long as the contract wasn't
16 like procured by duress or fraud or, you know, you were misled
17 or something like that, but that's exactly right.

18 The Supreme Court said that in the *Carnival Cruise*
19 case. They were like, you know, they consented; we don't have
20 to get into a minimum contacts analysis. And it's the same
21 with rule 12(b). If you -- rule 12(h), whatever it is, 12(h).
22 If you don't make your personal jurisdiction motion at the
23 outset of the case, you're deemed to have consented.

24 Even if there's no minimum contact, even if you have a
25 hundred percent correct, you know, you never set foot in the

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1 place, you don't make that motion, or if you don't raise the
2 issue on appeal. You know, you can consent to jurisdiction
3 late in the case. So it's -- and you don't need minimum
4 contacts. That's just traditional due process law.

5 THE COURT: But isn't it also -- as I try to analyze
6 this, to call this consent, isn't this just asserting
7 jurisdiction over a party that really isn't agreeing to be
8 sued?

9 MR. YALOWITZ: So like, I think about the *Bauxite*
10 case, which was the case where they didn't participate in
11 jurisdictional discovery, and so the District Court said, okay,
12 well, I'm deeming you to consent to personal jurisdiction
13 because you're refusing to participate in my processing. As a
14 sanction, you're now deemed to consent. They didn't -- they
15 didn't say, yeah, well, okay. Actually, we agree. They fought
16 it all the way to the Supreme Court.

17 So the fact that these defendants are fighting it
18 doesn't -- is not relevant to the legal analysis. The legal
19 analysis is did they do a thing that they knew would lead to a
20 jurisdictional consequence, and the best example of that, in my
21 mind, is Congress passed a statute called the ATCA.

22 ATCA said if you take our money, you are subject to
23 jurisdiction in terror cases, and the Palestinian Authority
24 wrote a letter to the Secretary of State saying, we're not
25 taking your money. And so they know how to not consent. And

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1 then, you know, the Court said, okay, well, they didn't take
2 the money; so they didn't consent. That's pretty simple.

3 They could have avoided all of this by saying, all
4 right, well, we're not going to pay these terrorists. That's
5 not that complicated. Most people don't pay people who are
6 sitting in jail for committing terror attacks. I mean, you
7 know, that's not -- it's not like a big, heavy lift to say
8 don't pay people who killed civilians. That's pretty standard
9 issue stuff, you know.

10 So I mean, one of their arguments is, well, we were
11 coerced, and I think what they're saying is we didn't -- I
12 mean, I don't really understand the coercion argument. You
13 know, I think what they're saying is, well, we're like the
14 corporations that want to do business in Connecticut, and
15 you're asking us too high of a price to do business in
16 Connecticut. We're a nationwide company. We can't
17 realistically not do business in Connecticut because we don't
18 want to be subject to general jurisdiction. Like, that's a
19 real issue.

20 I get that's a real issue because, you know,
21 corporations have interstate commerce protections and contract
22 clause protections, and you know, that's a normal thing in our
23 society, for nationwide corporations to be able to sell
24 products in all 50 states.

25 This is not like that. This is a -- there's like a

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1 longstanding U.S. policy going back since you and I were young
2 people, that we don't want the Palestinians paying terrorists.
3 We don't want the Palestinians committing terror attacks. We
4 don't want the Palestinians to kill U.S. citizens, and we are
5 going to do all we can with what power we have to prevent that.

6 THE COURT: What the analysis, though, of both the
7 Supreme Court and the Second Circuit is, or at least expects me
8 to go through, is to try to figure out whether or not Congress
9 can pass legislation that controls the conduct, the
10 extra-territorial conduct of individuals and entities that have
11 absolutely no presence in the United States, and demand that
12 they conform their conduct, which is outside of the U.S., to
13 certain standards that we hold, or more appropriate standards
14 than what they to conform to, and whether or not that assertion
15 of jurisdiction is consistent with due process.

16 You know, to tell France, you know, okay, we
17 decided -- now, I understand the arbitrary and rationality
18 related argument, but the basic argument that, oh, we tell
19 France, we no longer want you to sell champagne. Okay? If you
20 sell champagne, we consider that to be consent to be sued in
21 the United States for anything you do in the United States or
22 anything any person wants to sue you for in the world.

23 Well, I don't think that the Second Circuit or the
24 Supreme Court is implying that the rule extends that far.

25 MR. YALOWITZ: Right, because that's irrational.

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1 THE COURT: Okay. And your argument is, is that's
2 simply a rationality analysis --

3 MR. YALOWITZ: Right.

4 THE COURT: -- or arbitrary government action
5 argument?

6 MR. YALOWITZ: Right.

7 THE COURT: Well --

8 MR. YALOWITZ: Right. But if they said -- and, you
9 know, I'm flipping through my papers. I'm going to have to
10 look for it, but there are a lot of cases that say the United
11 States has an interest in protecting U.S. citizens when they're
12 abroad.

13 And that's different than the State of New York has an
14 interest in protecting their citizens when they're in Nevada.
15 No case says that, but there are a lot of cases that say that
16 when a U.S. citizen travels overseas, the protection of U.S.
17 law travels with them.

18 So, yeah, there's no question that the U.S. has power
19 to project U.S. law extraterritorially. And the defendant's
20 position is, well, but there still has to be minimum contacts
21 with U.S. soil, and so that would cripple the power of
22 Congress. I mean, that's the upshot of what they're saying.

23 There's a passage in their brief where they kind of
24 say, you know, there's all these things that would be legal if
25 our position is wrong, like imposing jurisdiction because

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1 people use U.S. currency or imposing jurisdiction because
2 people license U.S. software.

3 And it turns out that the United States of America
4 has, in fact, asserted jurisdiction in just those
5 circumstances. They've said, you know, you transact -- if you
6 have a corresponding banking account, then we're allowed -- our
7 financial regulators are allowed to look at any account in your
8 bank, even if it doesn't touch the United States.

9 And they've said, if you retransmit -- if you
10 retransmit software or U.S. origin military goods, you're
11 committing a U.S. crime, and we can impose criminal penalties,
12 we can impose civil penalties.

13 So the position of the defendants would really cripple
14 a lot of U.S. federal statutes, and I don't think that
15 that's -- I don't think that's required by the Constitution,
16 and I don't think it's appropriate.

17 THE COURT: Well, let me just go back to one earlier
18 issue. I understand what analysis that you urge upon me with
19 regard to the payment and the financial support of individuals
20 who have been convicted of or found guilty of terrorist acts.

21 I'm not sure I identify any real dispute of fact, but
22 with regard to the U.S. activities, it's a little more
23 difficult for me to say that, okay, I want to concentrate on
24 this activity. And it's clearly an undisputed fact that this
25 activity is non-related, activity that is not related to their

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1 UN business.

2 MR. YALOWITZ: Right.

3 THE COURT: How am I supposed to analyze that?

4 MR. YALOWITZ: Let me -- we'll just a -- I mean, this
5 is an area where there's -- some things are known, some things
6 are unknown, and some things you have to decide. So --

7 THE COURT: Wait. But not on a summary judgment
8 motion, not factual.

9 MR. YALOWITZ: Well, I think the known facts are
10 generally not subject to dispute. I don't think they're
11 disputing the facts and, you know, I've asked for discovery if
12 you can't resolve it. But let's see if we can -- I think
13 there's enough known that we can probably resolve it.
14 Although, I don't want to withdraw my request for discovery for
15 some things if we need to get there.

16 So there are three sets of facts. Set No. 1 is what
17 we've called like consular activities. So they notarize school
18 records, or they notarize birth certificates, and they put a --
19 you know, we put something in the record. One of our guys sent
20 his Southern District Bar certificate to be, you know,
21 authenticated, and it has all the stamps from Palestine on it.
22 So that's like what we call consular activities. That doesn't
23 have anything to do with UN business.

24 That's just like, you know, I put a stamp on something
25 in Anaheim, or I gathered something in Anaheim and send it to

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1 Canada and get it back. I've engaged in an activity on behalf
2 of the Palestinian Authority and the PLO in Chicago, or in
3 Anaheim or in New Jersey, but it doesn't have anything to do --
4 it's not like making a speech at the UN or urging, you know,
5 world peace. That's just kind of routine stuff that is a
6 service for human beings individually.

7 THE COURT: In my reading of the statute, maybe I've
8 misread it and you can point it out to me, any language. But
9 my reading of the statute, the statute doesn't concentrate on
10 activity. It concentrates on places and people.

11 MR. YALOWITZ: So, it did, and then Congress changed
12 it in 2019.

13 THE COURT: And which language are you addressing at
14 this point, the activities language?

15 MR. YALOWITZ: I'm just looking over at my other
16 screen. I'll move it so it doesn't look like --

17 THE COURT: Yes, it may have just --

18 MR. YALOWITZ: So if you look at 18, U.S.C.
19 2334(e) (1) (B) --

20 THE COURT: Which -- do you have a page on your brief?

21 MR. YALOWITZ: Oh, yes.

22 THE COURT: Please.

23 MR. YALOWITZ: It is --

24 THE COURT: I know I read it somewhere.

25 MR. YALOWITZ: Yes. Page 16, page 16 of my opener.

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1 THE COURT: 16?

2 MR. YALOWITZ: Yes, which is like 26 of 47, if you're
3 looking at the top header.

4 THE COURT: All right. Page 16. Defendants' office
5 and activity meet subparagraph 1(B)?

6 MR. YALOWITZ: Right, right. And then romanette (i)
7 is: Continues to maintain any office, headquarters, premises,
8 or other facilities or establishments in the United States.

9 Romanette --

10 THE COURT: As I said before, one deals with a place.

11 MR. YALOWITZ: Right. And then romanette (iii)
12 conducts any activity while physically present in the United
13 States on behalf of the Palestine Liberation Organization or
14 the Palestinian Authority.

15 THE COURT: Okay. I got you. Thank you.

16 MR. YALOWITZ: So when they have -- here's what the
17 record is on these consular activities. They had an office in
18 Washington. One of the things that the office in Washington
19 did was these consular activities. They had a website, in
20 those days, with a list of like agents around the country, who
21 you could contact to get your stuff notarized.

22 And then when the Trump administration closed the
23 office, they announced, you know, we're going to continue our
24 program, and then they did continue the program. And so
25 that's -- and that's, you know -- in my view, that's an

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1 activity on behalf of the PLO or the PA.

2 THE COURT: I'm sorry, which is an activity?

3 MR. YALOWITZ: Like, collecting, notarizing a birth
4 certificate.

5 THE COURT: You're talking about the consular
6 activities?

7 MR. YALOWITZ: Right.

8 THE COURT: You're saying the consular activities,
9 that I can determine that that authority or that activity is
10 unrelated to UN business?

11 MR. YALOWITZ: Right. Right.

12 Then, the second category is they give -- there's like
13 press, media appearances, press appearances.

14 THE COURT: Go ahead. That was what I was concerned
15 about because I'm not sure how media appearances, in and of
16 itself, is or isn't related to UN activity. I guess, as they
17 say, it depends on what the media is and, you know, what it's
18 related to.

19 MR. YALOWITZ: Well, yeah. I mean, let me sort of
20 take you through my reading, recognizing the defense has a
21 different reading of the statute. And this is just a legal --
22 I don't think there's any dispute that, you know, Riyadh Mansour
23 appeared at Seton Hall and gave a seminar. There's no dispute
24 that he gave an interview to NPR and, you know, so there's no
25 factual dispute. But the parties have a divergent reading of

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1 the statute.

2 THE COURT: So how do I determine whether that's a
3 legitimate advance in UN interest or advance in other interest?

4 MR. YALOWITZ: So the question -- how you come out on
5 that question depends on how you construe exception 3(f) in the
6 statute. And 3(f) is on -- bear with me, please -- 3(f) is on
7 page 19 of my brief, which is any personal or official
8 activities conducted ancillary to activities listed under this
9 paragraph.

10 THE COURT: Right.

11 MR. YALOWITZ: And because I think everybody agrees
12 that like -- I mean, there's also an exception A, or A and B,
13 for activity undertaken exclusively for the purpose of
14 conducting official business of the United Nations.

15 THE COURT: Right.

16 MR. YALOWITZ: But I don't think they're arguing that
17 giving a speech at Seton Hall is an official business of the
18 United Nations. What they're saying is, well, it's related
19 because I'm talking about peace in the Middle East, I'm talking
20 about our position, I'm talking about our aspirations for
21 sovereignty and, you know, all things which are related to our
22 presence at the United Nations.

23 THE COURT: But what would be your position, in
24 another unrealistic hypothetical in this case. What would be
25 your position on Fidel Castro coming to the United States to

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1 attend a UN event and going to a church and giving a speech?

2 Is it your position would be that, indisputably, that that
3 speech at the church is not UN business?

4 MR. YALOWITZ: Yeah, it's definitely not official
5 business of the UN. I mean, there's no question.

6 THE COURT: Well, it may not be official business of
7 the UN. It's official business of the country that is related
8 to --

9 MR. YALOWITZ: Right.

10 THE COURT: -- a UN activity.

11 MR. YALOWITZ: It is definitely related. And so the
12 question both in your hypothetical and in the Seton Hall speech
13 because, you know, it's the same, is: What is the meaning of
14 the word "ancillary" as used in paragraph (f)?

15 THE COURT: The meaning I give to it is "related to."

16 MR. YALOWITZ: Well, that's the defendants' --

17 THE COURT: That's not your definition, that it's
18 related to UN activity?

19 MR. YALOWITZ: That's not my argument.

20 THE COURT: What is your definition of "ancillary"?

21 MR. YALOWITZ: My definition of "ancillary" is
22 "necessary."

23 THE COURT: Well, ancillary is not necessary.
24 Necessary, as they say, is necessarily not ancillary.

25 MR. YALOWITZ: Okay.

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1 THE COURT: If it's necessary UN activity, it doesn't
2 qualify as ancillary UN activity.

3 MR. YALOWITZ: Okay.

4 THE COURT: It qualifies as UN activity.

5 MR. YALOWITZ: Let me say this about it. You may
6 ultimately disagree with me on this, and I don't need this to
7 win the case. But if you want, I can take you through why I
8 think I'm right on this, and then you can decide.

9 THE COURT: You're saying it has to be necessary?

10 MR. YALOWITZ: Right.

11 THE COURT: I'm not even sure that's even a
12 requirement for -- I mean, what's the opposite of ancillary?

13 MR. YALOWITZ: Unnecessary.

14 THE COURT: No, no. The opposite -- no, what's the
15 opposite of ancillary? Ancillary is not direct. So the
16 opposite of ancillary is a stronger connection to UN activity.

17 MR. YALOWITZ: Oh, I don't think so. I think this is
18 one of those cases, Judge, where there are two usages of the
19 word.

20 THE COURT: But we have --

21 MR. YALOWITZ: You're using --

22 THE COURT: (A) says that it has to be -- and that's
23 your argument -- used exclusively for the purpose of UN
24 activity; and (B) says it has to be activity undertaken
25 exclusively for the purpose of conducting official business.

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1 (F) makes an exception. (F) obviously, doesn't
2 require that it be exclusively, the purpose be exclusively for
3 the purpose of conducting UN activity. It can be ancillary.
4 It can be related to that activity, but you say "related to" is
5 not the appropriate definition to give to "ancillary."

6 MR. YALOWITZ: That is my argument. And as I said, I
7 don't -- at the end of the day, you may disagree with me, and
8 that's your job, not mine, is to construe the statute.

9 But let me take you through why I think I'm right, and
10 then you can decide. So one sense of the meaning of the word
11 ancillary, as you say, is related, loosely related. So, you
12 know, it was on the same trip or it's, you know, something like
13 that.

14 It serves that purpose, and some other purpose. But
15 there's another definition of ancillary, a narrower definition
16 of ancillary. And that narrower definition of ancillary is
17 well documented, and it's the definition in the Oxford English
18 dictionary. And the definition in the Oxford English
19 dictionary, which I quote in full in my reply brief -- and I'm
20 just looking for it here -- is on page 12 of my reply brief:
21 Subservient, subordinate, ministering to, pertaining to maid
22 servants, designating activities and services that provide
23 essential support to the function of a central service or
24 industry; also, staff employed in these supporting roles.

25 So that's a narrower sense of ancillary.

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1 THE COURT: I don't know of any legal definition of
2 ancillary.

3 MR. YALOWITZ: Yeah, the legal definition of ancillary
4 actually isn't very illuminating because you have like
5 ancillary jurisdiction, and it's just -- it doesn't really
6 apply here in a way that --

7 THE COURT: Well, that's what I don't understand, and
8 I'll have to analyze that for your argument. But I don't
9 understand why you say that the legal definition of ancillary,
10 which is not as convenient for you as the dictionary definition
11 of it, should be disregarded, and we should take your maid
12 servant's definition of it.

13 MR. YALOWITZ: Yeah, I don't think either side is
14 arguing for the legal, like ancillary jurisdiction argument,
15 because it's just different. It's like -- I think that
16 defendants are arguing for what you were saying, which is that
17 it just means related. It just means kind of linked in some
18 way.

19 THE COURT: So let me see the extent of your argument.
20 If they invited -- if they invited some UN officials to a
21 lunch --

22 MR. YALOWITZ: Yes.

23 THE COURT: -- and they had a lunch with UN officials,
24 would that fall under your definition of ancillary? It's not
25 necessary.

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1 MR. YALOWITZ: There's a different -- I mean, there's
2 a different exception for that, which is --

3 THE COURT: Let's start first with this exception.
4 Would that fall under your definition of ancillary or outside
5 of your definition of ancillary?

6 MR. YALOWITZ: So I would say that meeting with other
7 UN officials is necessary for conducting UN business. I don't
8 see how you conduct UN business -- you don't have to be on the
9 floor of the General Assembly to be conducting UN business.

10 THE COURT: Suppose you're not conducting UN business.
11 Suppose your Ambassador -- it's your Ambassador's birthday, and
12 you think it's in your best, interest given your UN contact, to
13 invite members of the UN to a reception, and they show up at
14 that reception. Is it your position that that is either for
15 the purpose of conducting official business, or that's
16 ancillary, or that falls under some other definition?

17 MR. YALOWITZ: Yeah, I mean, it obviously falls under
18 (D), which is meeting with officials of foreign governments.
19 So it's like the statute allows that. But, you know, I take
20 your question more to be like, okay, well, they're having a
21 birthday party for the staff. Well, you know, what is that?
22 Or they hire domestic help.

23 And, you know, look, I think that Congress was trying
24 to be narrow here. Congress was trying to -- the statute has a
25 rule of construction in it. The rule -- so we're not

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1 construing this word in a vacuum. I concede that "ancillary"
2 has some ambiguity to it.

3 THE COURT: Well, it doesn't have ambiguity to it. It
4 is here to expand the definition of what is UN business because
5 the other definitions say that they are allowed to engage in
6 activity that is exclusively for the purpose of UN business,
7 and this is, obviously, giving them not a lesser exception, a
8 greater exception --

9 MR. YALOWITZ: Okay. So I --

10 THE COURT: -- for activity that is not solely
11 exclusively for conducting official UN business.

12 MR. YALOWITZ: Exactly. So I would say -- the
13 birthday party example, I would say, is ancillary, and I'm
14 going to explain why I think that.

15 THE COURT: Okay.

16 MR. YALOWITZ: I think it is ancillary. So having a
17 birthday party is not consenting to jurisdiction, and let me
18 explain why I think that. There is a case, a Supreme Court
19 case that the defendants rely on that is actually incredibly
20 illuminating on this exact subject. It's called *Wisconsin*
21 *against William Wrigley Gum Company*. I forget the corporate
22 name, but it's Wrigley gum.

23 So there's a statute, a federal statute, that says if
24 all you're doing is soliciting business in an estate, then
25 you're not subject to taxation in that state. It's a commerce

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1 clause statute.

2 So the Wrigley gum company sends sales reps into
3 Wisconsin, and they do a bunch of stuff there. You know, they
4 go -- they're salespeople. They go there. They restock the
5 gum. They make sure the gum is fresh. They put signage up,
6 you know, all the stuff that people used to do back when brick
7 and mortar was how we bought stuff.

8 And the Supreme Court says, well, it's not just
9 soliciting business that's protected, it's also ancillary
10 activities. Ancillary activities are protected and don't
11 trigger taxation.

12 So then the Supreme Court says, okay, well, what does
13 that mean? How do we apply that to, you know, the various
14 activities that these individuals are engaged in? And the key
15 example is they go and they check and see if the chewing gum is
16 fresh, and if it's not fresh, they replace it. And the Supreme
17 Court says, well, that serves two purposes. Obviously, it
18 supports sales. People buy fresh gum, and if people buy stale
19 gum, they aren't going to buy Wrigley gum anymore. They're
20 going to say that gum is stale, I don't want Wrigley gum.

21 So it, obviously, is supporting sales, but it also
22 has -- supporting solicitation, but it also has a second
23 purpose, a second function, which is that it creates a direct
24 sale. And if you create a direct sale, you're not just
25 soliciting, you're actually selling. And the Supreme Court

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1 says because that activity does both, that is not ancillary.

2 That doesn't meet our narrow definition of the word ancillary.

3 So the Supreme Court in the *Wrigley* case is using that
4 Oxford English definition, not the -- you know, the looser
5 definition of ancillary. So the question then is, okay, well,
6 which -- you know, which definition is right for that -- this
7 statute? That's the question that you have to answer, and do I
8 take the narrower definition or do I take the broader
9 definition?

10 THE COURT: Well, the argument that I got from your
11 papers, and which I'm not sure that I can agree with the
12 statement, is this statement in the last full paragraph, on
13 page 21, which says, by that definition, where you're talking
14 about the definition of ancillary that they want -- that you
15 want to use, by that definition, press conferences and media
16 releases are not ancillary to official UN business because they
17 do not provide "essential support." Indeed, they simply are
18 "not conducted in furtherance of the PLO (UN) observer
19 statute."

20 Well, my response would be: It depends. Right?

21 MR. YALOWITZ: Right.

22 THE COURT: I can't make that kind of a blanket
23 statement that a particular -- that no press conference
24 furthers their UN status or business, and that no media
25 releases could qualify as conducting UN business. It depends

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1 on what its purpose is, what the activity is, what the issue
2 happens to be at the UN at the time. So --

3 MR. YALOWITZ: So --

4 THE COURT: The statement that you want me to make a
5 blanket statement that a press conference can't be related to
6 UN activity, that's a little difficult for me to make on this
7 record.

8 MR. YALOWITZ: Well, okay. So let me say two things
9 about that, and in the context of that, I'll take you to the
10 third piece of -- which is -- and this really captures it.

11 They send letters to the UN General Secretary like
12 once a month complaining about Israel, and then they retransmit
13 or rebroadcast those letters to -- on their Twitter feed; so
14 it's the exact same letter. And my argument is the
15 retransmission is different from sending the letter.

16 And the same way when you watch a baseball game, you
17 know, they say the retransmission or rebroadcast of this game,
18 without the express written permission of Major League
19 Baseball, is prohibited. Because the retransmission is
20 something different from the original transmission.

21 So my argument is when they Tweet a letter to 40,000
22 followers, they're doing that because they want the publicity.
23 They're doing that because they want to get people, you know,
24 agreeing with their positions, people in the general public.

25 THE COURT: Well, why is that necessarily not

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1 ancillary to the letter that they sent. If they send a letter
2 to the Secretary General of the UN urging a certain position,
3 and in conjunction with that, they publicize that letter to the
4 public to get public support for that position that they're
5 taking at the UN, how do I say that one is separated from the
6 other, one is UN business and the other is not?

7 MR. YALOWITZ: Okay. So let's break it down into two
8 pieces. Piece No. 1 is, is it official business of the United
9 Nations? Clearly, it's not. In the same way that my
10 retransmission of a baseball game is not official business of
11 Major League Baseball. It's my business. It's related to
12 Major League Baseball, but it's not official business of Major
13 League Baseball. So sending a Tweet is not.

14 And that was the holding in *Klinghoffer*, and that's
15 what I'm quoting.

16 THE COURT: Well, it doesn't say it has to be official
17 business of the UN. It has to be their official business
18 related to the UN.

19 MR. YALOWITZ: So, well, bear with me because I'm
20 thinking about -- there's two exceptions. It's either an
21 activity undertaken exclusively for the purpose of conducting
22 official business of the United Nations. Tweeting their letter
23 is not that.

24 So then the question is, okay, well, isn't it
25 ancillary? I mean, it's related. That's what they're arguing,

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1 it's ancillary, it's related. Like, we retransmit our UN
2 letters because we want people to know what we're saying to the
3 UN. And they probably would even go a step further and say,
4 you know, it's part of our business with the UN to let people
5 know what we're saying.

6 And so my argument -- and again, I don't want to get
7 too far down the rabbit hole on this, but I want you to
8 understand my argument. My argument is when they retransmit a
9 letter to the Secretary General, their best case is they're
10 doing it for two reasons; reason No. 1 is they want people to
11 know what they're saying to the UN, and reason No. 2 is they
12 want people to agree with them out in the world.

13 And that, to me, is just like the replacing the stale
14 gum, the Wrigley gum, doing it for two reasons. One reason is
15 ancillary, it's to support their UN business, and the second
16 reason is publicity. And publicity is just not -- it's
17 related, but it doesn't meet that narrow sense of ancillary.
18 It meets the related. If you say ancillary means related, you
19 know, I understand that argument, but my position is when you
20 have a rule of construction -- when you have a rule of
21 construction that says we want to construe the statute
22 liberally to support the purpose of Congress to assist terror
23 victims, and when you have a Legislative history that says
24 we're codifying the *Klinghoffer* case, and when you have this
25 sort of catch-all at the end of a long series of things that,

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1 if you take the defendant's position, would swallow the rule,
2 those are reasons -- those are statutory -- traditional tools
3 of statutory construction that tell you, adopt the narrower
4 sense.

5 THE COURT: The difficulty I'm having -- and I have to
6 analyze it further. The difficulty I'm having is to be able to
7 categorically say that what you just described is not them
8 engaging in UN business. You know, there are a lot of things
9 that you do to engage in UN business. There may be votes that
10 have to be taken. You may have to persuade other members of
11 the UN of your position that's going to be addressed at the UN.
12 You may need public support for that position. You may need to
13 communicate to your constituents, and even those who disagree
14 with you, why you're taking that position at the UN and why
15 that's a legitimate position to take.

16 But you want to take the narrowest view of UN business
17 to exclude everything that I would do that I say, I did this
18 because I'm advancing our interests, as UN members, with the
19 UN. And you're saying that, well, no, it's got -- the letter
20 that you sent to the UN is UN business, but you're distributing
21 that letter to the public to tell the public that that's what
22 you said to the UN. It's not UN business. That's a real
23 narrow definition of UN business.

24 MR. YALOWITZ: I would say it's UN business plus, and
25 my reading of ancillary is the "plus" makes it not ancillary.

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1 THE COURT: Okay. All right.

2 MR. YALOWITZ: And then, but I agree with you that
3 those retransmissions are the defendant's best facts, or
4 least-bad facts. But when you go to like promoting a movie
5 about surfing in Gaza, you know, I'm not sure what official UN
6 business that's about. I mean, maybe they -- maybe there is
7 some -- I don't -- you know, surfing in Gaza, okay. Or when
8 you fire off Tweets saying, you know, today is the day we
9 remember our racist adversaries or horrible people. I'm not
10 sure that that's official UN business. It's just they're
11 firing off, you know, grievance-laced Tweets.

12 THE COURT: Except on this motion, the "not sure" is
13 less than your burden. Your burden is it is factually
14 indisputable that I can determine that a particular activity
15 that you designated that they engaged in, is not ancillary to
16 their UN activity.

17 MR. YALOWITZ: Yeah. That was --

18 THE COURT: You're asking me for that.

19 MR. YALOWITZ: That was a rhetorical understatement.
20 I'm sure that surfing in Gaza is not official UN business.
21 They're not bringing Kofi Annan over to Gaza to go surfing.
22 That's not going to happen. It was -- anyway, I think you have
23 my argument then.

24 THE COURT: Then let me hear from --

25 MR. YALOWITZ: That's sort of a --

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1 THE COURT: Yes, I understand.

2 MR. YALOWITZ: So do you want to talk about the --
3 they have like a couple of kind of fall-back due process
4 issues, like retroactivity and unconstitutional conditions, and
5 we haven't talked about separation of powers.

6 THE COURT: Let me see how Mr. Berger addresses some
7 of my questions, and then I'll see.

8 MR. YALOWITZ: Okay. That's fine. Thank you, your
9 Honor.

10 MR. BERGER: Good morning, your Honor. Mitchell
11 Berger. Mr. Yalowitz spoke for a while, so I have quite a bit
12 to say in response, but let me deal with some of the easy ones
13 first.

14 His snarky remark about surfing in Gaza. Easy one.
15 It was a Tweet on UN International Sports Day. It's identified
16 in the hashtag. Every mission to the United Nations issued
17 some kind of statement on UN International Sports Day. We're
18 not talking about surfing. We're talking about UN
19 International Sports Day. That's official United Nations
20 business.

21 No. 2, consular activity. Whatever he submitted, of
22 course, predates the PSJVTA. In a related case before Judge
23 Vyskocil, there was jurisdictional discovery on this issue, and
24 the notary about whom Mr. Yalowitz submitted his affidavit, or
25 his colleague's affidavit, was cross-examined under oath. And

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1 he said, without contradiction, I am not an agent of the
2 Palestinian Authority or the PLO. I am a notary in the State
3 of New Jersey. As I do for my clients, I interact with
4 organizations to which they need to submit notarized documents.
5 So there's no factual support for his notion that we're engaged
6 in consular activities.

7 The old website of the old mission to which he
8 conferred, simply contained a list of notaries. That does not
9 make him agents of the United States, and here's why you would
10 know that. Your Honor is familiar with the Foreign Agents
11 Registration Act. If these notaries were agents of the PLO or
12 the PA, they would have to register under FARA, and they
13 didn't.

14 But let me start with the broader point on due
15 process, and tell your Honor why, according to the Second
16 Circuit in this case Mr. Yalowitz's due process test simply
17 can't be the test.

18 In the first appeal in this case, the plaintiffs made
19 a consent-to-jurisdiction argument. They said the PA and the
20 PLO consented to jurisdiction because, according to the
21 statutory terms of the Anti-Terrorism Act, jurisdiction is
22 established if you appoint an agent for service of process and
23 if service is made. Therefore, they argued, by accepting
24 service, we consented to jurisdiction.

25 The Second Circuit said -- first, they addressed

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1 plaintiff's argument that defendants consented to personal
2 jurisdiction under the ATA by appointing an agent for service
3 of process. This is at 835 F.3d 337 and 333 -- 343. What the
4 Second Circuit said is what your Honor said earlier. The
5 Second Circuit said "the statute does not answer the
6 constitutional question of whether due process is satisfied."

7 So let's look at that jurisdictional provision of the
8 original ATA. It gave fair notice to defendants that if they
9 appointed an agent for service of process, they could be
10 subject to jurisdiction. That's item one on Mr. Yalowitz's
11 test.

12 It was reasonably related, the plaintiffs argued, to a
13 legitimate government objective to bring before the Court those
14 who were alleged to be implicated in terrorism. They submitted
15 amicus briefs from United States Senators saying this is an
16 important part of the ATA, it serves an important governmental
17 purpose.

18 What the Second Circuit said, it doesn't matter if the
19 statute is fair notice. It doesn't matter that the statute is
20 related to a legitimate government objective.

21 (Interruption)

22 THE COURT: Anyone who is not speaking, please mute
23 your phone.

24 MR. BERGER: So we know, as a result of the Second
25 Circuit's first appeal decision in this case, that fair notice

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1 and reasonable relationship to a government objective is not
2 enough to satisfy due process.

3 What did the Second Circuit say? More is required.
4 Minimum contacts. Mr. Yalowitz says we accept that it's law of
5 the case that minimum contacts aren't satisfied.

6 So what happens when, to your Honor's point, there is
7 a Legislative attempt to use forced consent? I thought your
8 Honor's phrase helps me frame my argument perfectly. The
9 answer to that, according to the Brown decision in the Second
10 Circuit, is that it has to be free and voluntary consent,
11 particularly when there is no explicit consent. That's at 814
12 F.3d 626 and 640.

13 Well, that sounds nice, but how do we put some meat on
14 the bones of what is free and voluntary consent? I think
15 that's where your Honor's questions were driving here. Here is
16 the key point, and Mr. Yalowitz made it for me; so I'm going to
17 take it and use it to explain this point. He said, look at
18 what happened under the predecessor to the PSJVTA. The thing
19 called ATCA, the Anti-Terrorism Clarification Act.

20 It said you, the defendants, are deemed to consent to
21 jurisdiction if you accept either of two benefits: One,
22 continued foreign aid; or, two, a waiver to continue running
23 your embassy in Washington. The United States government, in
24 the *Klieman* case, as picked up by the Second Circuit in its
25 decision, said the following -- and this is what frames the

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1 difference between ATCA and the PSJVTA, and explains why the
2 PSJVTA does not satisfy due process.

3 What the government said, in defending the
4 constitutionality of ATCA, was that these were benefits that
5 the PA could potentially obtain, or the PLO, from the United
6 States, foreign aid or a waiver. And it said, at pages 12 to
7 13 of its March 13, 2019, brief: The political branches have
8 long imposed conditions on these benefits.

9 So what is the test for knowing and voluntary
10 consent -- forced consent, as your Honor said -- when it's not
11 explicit? The answer is, and it's very clear in the case law,
12 and your Honor has made a similar holding that I'll give to you
13 in a moment, that there has to be an exchange of benefits.
14 There has to be a quid pro quo.

15 You have to say to me, hey, if you take this benefit
16 from me, then you have submitted to jurisdiction. That's the
17 corporate registration model. Right? You register to do
18 business in the State. You accept the benefit from the State.
19 You are deemed to have accepted a benefit, in return for which
20 you consent to jurisdiction.

21 Your Honor, I'll give you a 2013 holding that you made
22 in the *Absolute Activist Master Value Fund* case, where you were
23 addressing due process issues. Your Honor held: Courts look
24 for circumstances, or a course of conduct, from which it is
25 proper to infer an intention to benefit from and, thus, an

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1 intention to submit to the laws of the forum.

2 So that's the test. There has to be a quid pro quo.
3 There has to be an exchange of benefits. ATCA involved a true
4 set of benefits, foreign aid, which the United States
5 government was not obliged to offer, or a waiver of a
6 prohibition. That's what makes the PSJVTA different. It is,
7 as all of your Honor's hypotheticals suggested, not an offer to
8 the PA and the PLO that here's a benefit for you to accept, but
9 if you accept it, it comes with a hook. It comes with
10 jurisdiction.

11 It is simply waiving a Legislative magic wand and
12 saying, if you continue doing, four months from now, everything
13 that you were already doing, now we're going to deem that that
14 is a consent to jurisdiction. And that is simply contrary to
15 what due process requires.

16 THE COURT: But consistent with the other cases,
17 that's not exclusively -- that's not the only way to
18 characterize it. The choice of --

19 (Interruption)

20 I'm sorry, someone is speaking?

21 (Interruption)

22 Please mute your phone. The telephone number ending
23 in 663, you need to mute.

24 What the statute said, particularly with regard to
25 activity, is that if you wish to engage in these activities

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1 that are non-UN activities, then you need to consent to
2 jurisdiction. If you wish to give up that benefit, then you
3 don't have to subject yourself to jurisdiction.

4 Now, I don't want to try to characterize that in the
5 other category of activity that they're talking about, in terms
6 of payments to individuals who have been killed or
7 incarcerated, but I'm not sure that the characterization,
8 whether it's an appropriate constitutional characterization is
9 another question.

10 But I'm not sure that I can simply say, well, the
11 difference between the cases that you've cited in this analysis
12 in the past is that there's some quid pro quo that they're
13 giving up in exchange for not being subject to jurisdiction,
14 and in this case, there is no such thing.

15 I'm not sure that -- you know, look, the choice is
16 still there, and the choice is there to be made going forward,
17 that if you want the benefit of doing these other things,
18 you're going to have to subject yourself to the jurisdiction.
19 If you don't want the benefit of doing those other things, then
20 you don't engage in those activities, and you won't be subject
21 to jurisdiction.

22 I'm not sure I see the big distinction between
23 somehow, in one case there's a benefit that's being conferred,
24 and in this case, there is no benefit being conferred.

25 MR. BERGER: Your Honor, I think you've put your

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1 finger on the framework, but here's why we think that this is
2 essential to due process, and why it's missing here.

3 First of all, the plaintiffs in their reply brief
4 really helped frame this issue. They concede, and you can find
5 this at pages 17 and 26 of their reply brief, that there is no
6 benefit that the PA and the PLO receive under the PSJVTA, no
7 benefit. That's their position, but it's correct, as a matter
8 of law, that there is no benefit.

9 But let me give you the Supreme Court's most recent
10 statement on what jurisdictional due process requires in the
11 *Ford* case. What the Supreme Court said there is that
12 jurisdictional due process turns fundamentally on -- and I'm
13 quoting here -- reciprocal obligations, reciprocal obligations,
14 between the defendant and the forum, and that's exactly what an
15 exchange of benefits is. Your Honor can find that at 141,
16 Supreme Court, pages 1025 and 1030. Reciprocal obligations by
17 which a defendant avails itself of the right to do business in
18 the forum and is, therefore, subject to the forum's regulation.

19 Here's why --

20 THE COURT: Why is it, in this case, that the question
21 is whether -- even if it's framed that way, whether or not the
22 right to do non-UN business is being exchanged for
23 jurisdiction?

24 MR. BERGER: And, your Honor, I think that's exactly
25 the right question to ask, and here's the reason why plaintiffs

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1 are right when they say there is no benefit to the PA and the
2 PLO under the PSJVTA.

3 The behavior -- and this is why we contest the U.S.
4 activity predicate of the statute. All of the behavior in
5 which the PA and the PLO is alleged to have engaged in falls
6 squarely within 30, 40-years old judicial precedent in the
7 Southern District and in the Second Circuit saying that this is
8 not a benefit that the United States confers on the PA and PLO.

9 That activity is mandated *a priori* by the UN
10 Headquarters Agreement, and that is why in the *United States v.*
11 *PLO* decision out of the Southern District, the Court held we
12 have to construe the 1987 Anti-Terrorism Act, which prohibits
13 any PLO activity in the United States, we have to carve out
14 from that any UN-related activity because the United States
15 can't prohibit that, as a signatory to the UN Headquarters
16 Agreement.

17 THE COURT: The statute doesn't prohibit that.

18 MR. BERGER: The statute --

19 THE COURT: The statute does not prohibit UN activity.

20 MR. BERGER: This statute neither allows nor disallows
21 UN activity. It is -- Mr. Yalowitz -- if I can make this
22 point, your Honor, it's very important. Mr. Yalowitz used this
23 word in his argument today and he uses it in his brief. He
24 says what the PLO did is simply codified, preexisting,
25 judicially established rules concerning what the PLO can do and

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1 what it can't do as an invitee of the United Nations under the
2 UN Headquarters Agreement. That's in their brief at page 20
3 and their reply brief at pages 26 through 27.

4 The statute doesn't allow anything. The statute
5 doesn't disallow anything. It does, in Mr. Yalowitz's words,
6 simply codify preexisting law. By codifying preexisting
7 judicial law, it neither adds to nor subtracts from what the
8 defendants can already do.

9 Now, there may be a factual question, as your Honor
10 raised earlier, about does it fit within the ambit of what was
11 previously authorized by the Southern District in the *U.S. v.*
12 *PLO* case and the *Mendelsohn v. Meese* case, and by the Second
13 Circuit in the *Klinghoffer* case.

14 But the answer is, and I'm happy to go through those
15 standards from those cases, but it's quite clear that
16 everything that the PLO UN mission and its personnel have
17 alleged to have done, fall within the ambit of the preexisting
18 protection of the UN Headquarters Agreement. The UN
19 Headquarters Agreement is untouched by the PSJVT. It doesn't
20 add to. It doesn't prohibit anything. It doesn't confer any
21 benefit.

22 Your Honor's template certainly is a fair one, if
23 there were benefit, like the ones under the ATCA, USA, a waiver
24 to operate a mission. Then the U.S. government would certainly
25 take the position that there is an exchange of benefits, but

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1 that was the U.S. government's position as to why ATCA was
2 constitutional.

3 The U.S. government surely would take the position
4 that the PSJVTA neither allows nor disallows additional
5 behavior. What is clear is that anything that is UN related
6 and in furtherance -- in furtherance, your Honor, sounds an
7 awful lot like ancillary, doesn't it -- in furtherance of UN
8 activity was allowed under the *Klinghoffer* decision.

9 And, indeed, your Honor held earlier in this case,
10 Second Circuit characterized it in the first appeal, 835 F.3d
11 at 317. Your Honor held earlier in this case, activities
12 involving defendants' New York office were exempt from
13 jurisdictional analysis under an exception for United
14 Nations-related activity, articulated in *Klinghoffer*. That's
15 preexisting law.

16 Mr. Yalowitz says, along comes the PSJVTA, it doesn't
17 change preexisting law, it simply codifies it. That's not
18 getting --

19 THE COURT: Mr. Berger, that sounds like a logical
20 argument, but I'm not sure I can accept the position that
21 simply because there was a previous benefit that was conferred,
22 that it can't be an exchange of benefits for certain rights
23 going forward.

24 The PLO doesn't have any constitutional, independent
25 right to run a mission in the United States. It doesn't. The

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1 U.S. could simply say, and can take the position -- I believe
2 they've taken a position in the past, and they could take the
3 position in the future -- that they would no longer allow that
4 in the United States, and they will no longer allow them to
5 have a UN mission in the United States.

6 They're not entitled to a U.S. mission by any
7 unchangeable U.S. or international law. So for Congress to
8 come back and say, look, from now on, our position is this,
9 we're not going to let you come to the United States and have a
10 mission for free. We're going to say to you, in the future,
11 that if you want to maintain a mission in the United States,
12 then you're going to have to agree to subject yourself to
13 jurisdiction.

14 MR. BERGER: So they can't, your Honor.

15 THE COURT: There's nothing I know in the previous
16 analysis that would necessarily restrict the U.S. government
17 from taking that position.

18 MR. BERGER: There is, your Honor, respectfully.

19 THE COURT: Okay.

20 MR. BERGER: What restricts the U.S. government from
21 taking that position, because that was the position the U.S.
22 government took when the 1987 Anti-Terrorism Act was passed,
23 and Judge Palmieri, in the *United States v. PLO*, said that may
24 be what Congress said, but Congress is constrained by the U.S.
25 government's antecedent accession to the UN Headquarters

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1 Agreement, so it can't. And it can't burden UN participation
2 without abrogating UN Headquarters Agreement, which it hasn't.

3 Now, amazingly, plaintiffs argue that the PSJVTA did
4 abrogate the UN Headquarters Agreement. That's because they
5 know that the UN Headquarters Agreement is actually the source
6 of defendants' rights, and so it's essential for them to argue
7 that the PSJVTA abrogates the UN Headquarters Agreement.

8 But that can't be so for at least three reasons: One
9 is, Mr. Yalowitz talks about submission of letters to the UN.
10 There's no notice whatsoever, no evidence of any notice
11 whatsoever, that the United States government has informed the
12 United Nations that it has abrogated the UN Headquarters
13 Agreement. In fact, it would probably come as a shock to
14 people at the UN.

15 THE COURT: But this seems to be a red herring for me
16 because you're absolutely right, this has absolutely nothing to
17 do with the UN observer status of the PLO. That has not
18 changed. That has not become an exchange of some other
19 promise --

20 (Interruption)

21 Whoever is on number 6770, would you -- sir? Sir?

22 (Interruption)

23 Mute your phone, please. Mute your phone. Sir? Sir?

24 (Interruption)

25 Okay. Maybe we'll take care of it. All right. I'm

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1 sorry, Mr. Berger.

2 MR. BERGER: That's no problem, your Honor. I think
3 where we agree --

4 THE COURT: That doesn't seem to take me in one
5 direction or the other because that's not what this fight is
6 about. This fight is not about changing its observer status.
7 This statute doesn't say anything about the observer status.
8 It doesn't give any conditions on whether that they're going to
9 maintain their observer status.

10 It talks about whether or not they're going to be able
11 to do activities unrelated to the observer status and saying
12 that you don't have the right to do that, and you're not going
13 to be able to do that unless you consent to the jurisdiction.
14 So --

15 MR. BERGER: So, your Honor --

16 THE COURT: So relying on the observer status part of
17 it doesn't seem to advance this argument one way or the other.

18 MR. BERGER: Respectfully, your Honor, I think it
19 does, and here's why. The reason why the PLO cannot do things
20 that are unrelated to its UN observer mission, exactly the
21 hypothetical that your Honor is positing, is that the 1987
22 Anti-Terrorism Act makes it illegal for the PLO to do anything
23 in the United States. Full stop.

24 The court said, you've got to carve out the UN stuff.
25 So now there's a clear dividing line, UN, non-UN. That's

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1 preexisting law. Several things are true. Four different
2 judicial decisions -- two out of the Southern District, two out
3 of the Second Circuit -- define what is the protected zone of
4 UN activities.

5 The two Second Circuit decisions are, No. 1,
6 *Klinghoffer*, which says anything in furtherance of the PLO UN
7 mission is protected. The other is in this case, when the
8 Second Circuit, in the first appeal -- second appeal, rather,
9 said nothing in *Klinghoffer* suggests that the PLO's engaging in
10 activities unrelated to its observer status transforms it into
11 an office or other facility within the jurisdiction of the
12 United States. But the Court does not have to parse this
13 stuff --

14 THE COURT: That's not this issue. That is a separate
15 item. This issue is not about defining jurisdiction. It's
16 about defining consent.

17 MR. BERGER: But, your Honor, consent cannot occur,
18 which is, you can't wave a wand and say to me, you know,
19 Mr. Berger, you have been going to your office every day in
20 order to prepare to litigate this case, but if you continue
21 doing so, 120 days from now, you're deemed to have consented to
22 jurisdiction.

23 What the due process requires is more than saying I'm
24 giving you advance notice. You have to give me something in
25 return for that, and so, your Honor, I respectfully suggest

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1 that the reciprocal obligations test, the Supreme Court's test
2 in *Ford*, you meet it in only one of two ways. You meet it
3 either by having minimum contacts with the jurisdiction, or you
4 meet it by an exchange of benefits. Those are reciprocal
5 obligations. I understand your Honor's point, which is --

6 THE COURT: You can't exchange benefits that you
7 hadn't previously extended.

8 MR. BERGER: Yes, you can. That is exactly right.
9 That is my submission. You can't tell me that something you
10 already constrained, as a matter of law, to do, which the
11 courts told you 35 years ago you are constrained to do this,
12 that is not a benefit, to say I will continue obeying the
13 law --

14 THE COURT: Well, who is constrained to do what?

15 MR. BERGER: The United States government is
16 constrained by the UN Headquarters Agreement, under its
17 authoritative construction by the Southern District and the
18 Second Circuit to allow what I will call a protected zone of UN
19 protected activities.

20 THE COURT: And that's not at issue here. That's what
21 I don't understand about your argument. This statute doesn't
22 affect that right whatsoever.

23 MR. BERGER: But your Honor, that's where I think
24 we're missing each other with respect to --

25 THE COURT: I know because you keep saying that that's

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1 what's at issue here, and the UN status has not been changed.
2 It's not been affected. It is not at issue. It is not in
3 dispute.

4 MR. BERGER: But that, your Honor, respectfully, is a
5 factual question of where the line is drawn. The premise of
6 your Honor's question --

7 THE COURT: That's a different issue. You can either
8 argue that the factual basis isn't there for me to make that
9 determination, or you can argue what I just heard you argue,
10 that categorically, they can't make this requirement because
11 somehow they're changing the rights without some exchange of
12 benefits. So that's two different arguments.

13 MR. BERGER: I have three points in response to that.
14 One is that line was drawn in the 1987 ATA. It's codified at
15 52 U.S.C. -- I mean, 22 U.S.C. 5202.

16 THE COURT: You tell me what was codified. You can't
17 say it was codified if it affects the judgment of whether or
18 not they can say that if you want to conduct non-UN business,
19 you have to agree to these terms.

20 MR. BERGER: Right. But, your Honor, my point is,
21 let's start with what the previous state of the law was, which
22 frames the lack of an exchange of benefits. I'll refer your
23 Honor to the *Mendelsohn v. Meese* decision, which was the
24 companion 1988 case to *U.S. v. PLO*, 695 F.Supp. 1456 at 1484.

25 It frames your Honor's point about the benefit. What

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1 it says is the purpose of section 1003 of the 1987 ATA, which
2 is codified at 22 U.S.C. 5202, is "to deny the PLO the benefits
3 of operating in the United States." That's preexisting law.

4 PLO --

5 THE COURT: No, no, no. Those cases were talking
6 about the benefits of UN observer status.

7 MR. BERGER: Well, your Honor --

8 THE COURT: What other benefits are any of those cases
9 addressing?

10 MR. BERGER: They're addressing whether or not other
11 than UN-related issues.

12 THE COURT: What issues?

13 MR. BERGER: For example, this is the reason why a
14 waiver is required for a U.S. mission in Washington. Right?
15 It says, the purpose of this 1987 law is to deny the PLO the
16 benefits of operating in the United States. What the cases
17 then did is they say, that's the starting point, zero in the
18 United States. From that, we carve out UN-related things.

19 THE COURT: Right.

20 MR. BERGER: But the purpose is, and it comes with an
21 enforcement mechanism.

22 THE COURT: I know, but how has that changed? How is
23 what's being done somehow inherently inconsistent with that
24 analysis when that status has not changed?

25 MR. BERGER: Your Honor, I think we're saying the same

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1 thing but drawing different conclusions from it.

2 THE COURT: Okay.

3 MR. BERGER: That hasn't changed. The fact that it
4 hasn't changed from 1987 means -- let me put this in --

5 THE COURT: It can't change.

6 MR. BERGER: What's that?

7 THE COURT: It means that it can't change.

8 MR. BERGER: It means that it hasn't been changed, and
9 so I would use a contractual analogy, which is, you can't
10 create contraction, a new consequence, without fresh
11 consideration.

12 There's nothing new here that the U.S. government is
13 offering to the PA and the PLO. It's not like saying I'll give
14 you aid next year, I'll give you a waiver next year. It's
15 recycled law from 1987, in Mr. Yalowitz's word codified. It
16 can't be a benefit.

17 THE COURT: I know, but there was no law -- there was
18 no guarantee, and there was no right of the PLO to conduct
19 non-UN business in the United States.

20 MR. BERGER: All right. Your Honor, that's --

21 THE COURT: It's a right that the government couldn't
22 deny or exchange or put conditions on. They don't have that
23 right today.

24 MR. BERGER: The government can't, as a matter of the
25 UN Headquarters Agreement, put any burdens on the UN presence.

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1 THE COURT: Right.

2 MR. BERGER: The government has, for decades, burdened
3 everything else and prohibited it in the United States. So
4 Mr. Yalowitz --

5 THE COURT: So the argument you just made because you
6 claim that they never put any restrictions on the UN business,
7 and they put restrictions on the kinds of business they could
8 value and the business that they could do. How is that
9 different than what's happening here?

10 MR. BERGER: Your Honor, I'm saying that all the
11 PSJVTA does is say, we're not changing the preexisting state of
12 the law. That's Mr. Yalowitz's argument, too.

13 My point is if you're not changing, despite the fact
14 that Congress could, Congress hasn't. Congress hasn't said
15 anything in the PSJVTA that is any different from preexisting
16 law. That being the case, there is no fresh consideration like
17 there was under ATCA, to say I'm now attaching new
18 consequences, and here --

19 THE COURT: Well, okay. But I don't want to -- I
20 didn't mean to interrupt you, but I don't want to play
21 semantics with you because what you say that they have said,
22 they have not said it in the context and for the meaning that
23 you want to use it.

24 What Congress has done is Congress has said, look, we
25 don't like the fact that you can injure and kill U.S. citizens

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1 abroad and still come to the United States and do whatever
2 business you want to do. That's the current state of the
3 agreement. So from now on -- and we've observed this case,
4 it's been thrown out because the court says there's no
5 jurisdiction.

6 Well, we want to protect the interests of U.S.
7 citizens; so, therefore, we are going to say, from now on, if
8 you want to do these other activities, unrelated to your UN
9 presence because we know we don't have the right case law and
10 precedent and indicate you don't have the right to restrict
11 your UN presence, but if you want to do other activities
12 unrelated to that UN presence, from now on, we put several
13 conditions on you in exchange for your being able to do that in
14 the future.

15 One, is that you don't pay people who are injured or
16 killed or jailed with regard to what we claim are terrorist
17 acts; and, two, if you want to continue to have the benefits of
18 not being sued in the United States, you are going to have to
19 not do any non-UN business in the United States. Otherwise, if
20 you want to do non-UN business in the United States, you're
21 going to have to agree in the future to subject yourself to
22 jurisdiction. That's your choice.

23 If you don't want to do it, you don't have the right
24 to do business in the United States, other than UN business.
25 If you want to do business in the United States other than UN

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1 business, you're going to have to agree to these terms. You're
2 saying that --

3 MR. BERGER: Okay, your Honor.

4 THE COURT: -- you don't have the right to do that.

5 MR. BERGER: Right. You Honor, you and I, I think,
6 are on exactly the same wavelength here, and it boils down to
7 this question. Because from 1987 forward, Congress has already
8 said if you come into this country and you do activities
9 unrelated to the United Nations, you've committed a crime.

10 So now what your Honor is saying, Congress can say,
11 not only is it a crime, it can say, there are civil
12 consequences in terms of jurisdictional attachment. But your
13 Honor's construct, at least, agrees with me, which is to say
14 there's that quid pro quo. There is the, if you want to do
15 this, then this follows. That's my point, your Honor. That
16 now reduces to a factual question. Are we doing things that
17 fall outside of what your Honor calls "other activities" and
18 here's why the answer is no.

19 THE COURT: That part of the argument I understand. I
20 just don't understand that I can make a determination simply
21 that Congress, by passing this statute, went beyond its
22 authority because there was no exchange of benefits.

23 MR. BERGER: But, your Honor, that is our argument,
24 which is, there's only one way to tell whether the standard, as
25 articulated in *Brown*, which plaintiffs concede. What is free

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1 and voluntary consent? It can't be a seat-of-the-pants
2 determination. There has to be a bright-line test.

3 THE COURT: Right.

4 MR. BERGER: Our argument is that free and voluntary
5 consent requires an identifiable exchange of benefits when
6 legislation demands this. So like Mr. Yalowitz talks about
7 cases like *Bauxite*. *Bauxite* doesn't involve Legislative deemed
8 consent. It involves an act of judicial submission.

9 Your Honor, if I show up in front of you making this
10 argument, that my client is not subject to jurisdiction, and I
11 offend you and you hold me in contempt, it's not a question of
12 an exchange of benefits. It's I've submitted to the Court's
13 jurisdiction. But you have to take judicial submissions,
14 judicial acts, and move them to the side. It's the same thing
15 like rule 12(h). If I don't preserve my jurisdictional
16 defense, that's a judicial act.

17 THE COURT: But the problem is --

18 (Indiscernible crosstalk)

19 MR. BERGER: -- legislation.

20 THE COURT: The problem I have with both arguments on
21 this issue is that you have yet to convince me that this is a
22 new definition of jurisdiction. It is not a new definition of
23 jurisdiction. It is whether or not this is an appropriate
24 definition for consent, and that's not what the cases deal
25 with. That's the uniqueness of this case.

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1 This legislation is written in terms of consent. It
2 is not written in terms of obligations. It's not written in
3 terms of how you define jurisdiction. It doesn't even say
4 anything about whether or not the Supreme Court's definition of
5 jurisdiction, as applied by the Second Circuit, has any
6 infirmity whatsoever.

7 It's if you do these acts, if you want to do these
8 acts, you will have to consent to these terms. And so that's
9 what is sort of hard for me to jump on those cases that you
10 guys are citing on both sides and say, oh, yeah, that resolves
11 this issue. It doesn't resolve this issue.

12 This issue is about whether or not you -- it is if you
13 do the acts that the statute says that you cannot do unless
14 you're going to consent, by doing those acts, have you
15 consented. That's the simple question, isn't it?

16 MR. BERGER: Right.

17 THE COURT: Before I get to the due process
18 constitutional issue, that's the simple question.

19 MR. BERGER: So, your Honor, I think we're saying a
20 lot of the same things because your characterization there was
21 an "if then" clause, if you do this, then jurisdiction follows.
22 So put aside exchange of benefits. Maybe "benefits" is
23 confusing the discussion.

24 I call it a quid pro quo. If I do this, then this
25 happens to me.

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1 THE COURT: Right.

2 MR. BERGER: What Mr. Yalowitz said that tests for due
3 process is fair notice, no arbitrary government action and
4 minimum contacts. But when there's not minimum contacts,
5 because what your Honor said is we're not talking about
6 jurisdiction, we're talking about consent. So you have to have
7 fair notice for sure. You have to have no arbitrary government
8 action.

9 But what the Second Circuit told us in *Brown* is it
10 also needs to be free and voluntary. So what is free and
11 voluntary? And that's what we're talking about. And what my
12 submission is, your Honor, is that free and voluntary is, as
13 your Honor defined it, if I do this, then this happens. At
14 least now there's an "if, then" progression to the argument.

15 And I agree that if the United States wanted to put
16 some additional burden on non-U.S. activity, beyond existing
17 criminal prohibitions, then maybe that would fit our "if, then"
18 quid pro quo scenario. But it raises the factual question, and
19 this is the whole purpose of why we don't concede the U.S.
20 activities section has been met. How do I tell?

21 I've already addressed two parts of that. I've
22 already said there's no evidence of consular activities. It's
23 fully rebutted by discovery in another case. Happy to submit
24 that here. We have also, I think, addressed this nonsense
25 about surfing in Gaza, which was UN Sports, clearly UN related.

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1 So how do we tell what is UN related? And let me give
2 your Honor what I think is a very easy test -- two easy tests
3 that avoid the need to parse constantly, does this fall and
4 fall within that? No. 1, by official United Nations mandate,
5 Palestine, as an observer member of the United Nations,
6 non-member state, belongs to something called the UN Committee
7 on the Exercise of the Inalienable Rights of the Palestinian
8 People.

9 Here's the committee's mandate. The committee's
10 mandate absorbs everything to which Mr. Yalowitz has pointed,
11 speeches, social media and the like. What the committee's
12 mandate say -- and I'm going to quote here, I'm not trying to
13 be polemical. We all know that these are hot-button issues
14 currently. Let me quote the UN mandate to the UN Committee on
15 the Exercise of the Inalienable Rights of the Palestinian
16 People. It is to focus on diplomatic efforts and initiatives
17 to support the achievement without delay of an end to Israeli
18 occupation that began in 1967 and of the two-state solution on
19 the basis of 1967 lines, which includes "continuing to mobilize
20 the international community to stay steadfast in its support
21 for the inalienable rights of the Palestinian people."

22 "Mobilizing the international community," that's the
23 Tweets, that's the speeches, that's the radio appearances, and
24 your Honor was already onto this earlier. We don't even have
25 to worry about what's ancillary. This is a core part of the

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1 official duties of the UN mission.

2 But here's the second test that also makes it easy
3 because, your Honor, we're in agreement that non-UN activities
4 are already criminal under 22, U.S.C. 5202. Well, 22, U.S.C.
5 5203 says that if Palestine UN mission personnel exceed the
6 protected area -- the one that your Honor defined -- then the
7 Attorney General may bring an action for enforcement to enjoin
8 that activity.

9 There has been no evidence of any enforcement activity
10 whatsoever. That was the status quo when the PSJVTA was
11 passed, and very importantly, the Second Circuit -- and I give
12 your Honor a case cite for this -- presumes that Congress
13 legislates against the backdrop of existing law, and that
14 includes its enforcement history. You can find that *Pharaohs*
15 *GC, Incorporated v. Small Business Administration*, 990 F.3d
16 217.

17 In other words, Congress is presumed to have enacted
18 legislation, in this case the PSJVTA, knowing that the status
19 quo of what the UN mission and its personnel were doing was
20 within the permitted zone of UN activity because there had been
21 no enforcement action. So Congress could say, I'm going to
22 attach a new consequence to that activity, jurisdiction, not
23 just criminal provision, but there still has to be evidence
24 that that activity exceeded what is allowed. And our
25 submission is, there is no evidence that it exceeds the

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1 protected area.

2 THE COURT: The problem that I have, and I have to
3 think out, is that you're giving me examples that apply to how
4 one defines jurisdiction. And, for me, this is not the
5 determinative issue of how one defines jurisdiction.

6 The question is whether or not this is consent. And
7 so you can focus me, let me basically tell you where I am at
8 this stage. First of all, this argument about the activities
9 does not seem to me to be the determinative argument on this
10 motion.

11 Why? It's because even if I accept your argument on
12 this activity, that does not address the issue of the payment
13 of monies to persons designated to the terrorists who have
14 injured U.S. citizens or their families. There doesn't seem to
15 be any real genuine dispute. The conduct that's being
16 addressed is still going on, and that if you strictly go by the
17 language of the statute, that that activity falls within that
18 statute, and there's no question that that activity is still
19 going on.

20 So the question doesn't seem to be determinative as to
21 whether or not they're violating the letter of the law of the
22 statute. The question is whether or not it is consistent with
23 due process to say that even though you continue to do that,
24 and because you continue to do that, it constitutes consent to
25 jurisdiction, and whether or not that meets the requirements of

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1 constitutional due process.

2 So no matter how I look at it, whether I accept your
3 argument, unless you want to give me an argument that somehow
4 there's a genuine dispute as to whether or not, in fact, a
5 prohibited activity with regard to payment to individuals who
6 have injured U.S. citizens, whether or not there's some real
7 dispute as to whether those payments are still taking place.

8 So the question really is whether or not that
9 restriction and/or the restriction on activity is still
10 prohibited legislation because it is unconstitutional to do
11 that because it is inconsistent with due process. So unless
12 I'm convinced one way or the other on the due process argument,
13 it seems to me that neither one of the arguments are
14 determinative of this issue.

15 MR. BERGER: So, your Honor, let me address that
16 because I think the payments, from Palestine's point, is, if I
17 can borrow your Honor's phrase, a red herring. Here is why you
18 can't possibly predicate jurisdiction, by consent or otherwise,
19 on the payments in Palestine.

20 It's like one of your analyses about what happens in
21 New Jersey, which is, United States government has no authority
22 to regulate what the PA and the PLO do in Palestine. Now, if
23 what the PA and the PLO do in Palestine, by making payments,
24 has a direct effect on the United States, then it would be
25 minimum contacts jurisdiction.

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1 THE COURT: I'm not sure I agree with that statement,
2 that United States has no ability to affect what goes on in
3 other countries. We do it all the time.

4 MR. BERGER: We do it as --

5 THE COURT: We tell people all the time, unless you
6 comply with these conditions, we are not going to give you, as
7 you say, a certain benefit. So I don't think I can accept that
8 if the U.S. says it's in their best interest, in order to
9 protect U.S. citizens, to demand this from other countries,
10 even if it's not happening in the United States, I'm not sure I
11 can accept the premise that they don't have an interest or the
12 right or the ability to do so.

13 MR. BERGER: Well, so your Honor provided the answer.
14 I think to that construct, earlier in a remark you made to
15 Mr. Yalowitz, you said do you agree that Congress can't change
16 a due process analysis, that that's beyond their power. He
17 said, well, they'd like to think they can, but they can't.

18 The Second Circuit in this case already considered the
19 two things that are at issue in the PSJVTA. They considered
20 payments in Palestine, and they considered advocacy in the
21 United States. And it held that neither of those, as a
22 constitutional matter, could support jurisdiction. You can
23 find that at 835 F.3d 341 to 42.

24 So now, the question is, having been told by the
25 Second Circuit that payments in Palestine and advocacy in the

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1 United States does not create a jurisdictional nexus that
2 satisfies due process, can Congress wave a wand and say, okay,
3 I know it doesn't satisfy minimum contacts, but I'm now going
4 to say if you keep doing this, that which does not satisfy due
5 process, then you are deemed to consent to jurisdiction, and
6 the answer to that is clearly, no, for two reasons.

7 One is it's a Legislative effort to alter the due
8 process standards. That's the separation of powers point. The
9 other, the due process point, is there has to be something
10 within the power of the United States to give or take away --
11 not give or take away jurisdiction -- give or take away a
12 benefit and you can't say that that's the case.

13 So, for example, if Congress said any bank in the
14 Middle East that processes payments for terrorists, which is
15 clearly injurious to the United States, that that subjects you
16 to jurisdiction in United States courts, well, guess what,
17 that's already the Anti-Terrorism Act and the Second Circuit
18 important held that's not good enough.

19 THE COURT: Again, you both are doing this. You
20 characterize it in a way that the issue that doesn't exist
21 before me. That is not the issue before me. This is an issue
22 of consent. Okay? This is not an issue of what confers
23 jurisdiction. I agree with you, and Mr. Yalowitz would have to
24 agree, that there's nothing in this legislation that confers
25 jurisdiction, the power of conferring jurisdiction to Congress.

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1 Congress has not done that.

2 As a matter of fact, the reality is the concern that
3 you raise is probably exactly why Congress decided to word it
4 this way, to avoid a constitutional attack on the legislation,
5 that the legislation is changing the definition of
6 jurisdiction, or is loosening the requirements for
7 jurisdiction.

8 So the question is not whether or not this is a
9 legitimate assertion of jurisdiction. The question is whether
10 or not this -- as it would be in any context if it wasn't
11 jurisdiction -- whether or not this is a legitimate assertion
12 of the principle of consent, informed, voluntary, on-notice
13 consent.

14 So I can't disagree with you, the way you characterize
15 it, you know, with regard to what their powers are or lack of
16 powers to assert jurisdiction. But Congress isn't asserting
17 jurisdiction. They're not changing the definition of
18 jurisdiction. They are saying that regardless of what is
19 required for jurisdiction, if you want to engage in certain
20 activities, you're going to have to consent.

21 MR. BERGER: So, your Honor --

22 THE COURT: The question is, where do I go for
23 guidance in terms of what would be a valid consent?

24 Now, you already said one point, which is a legitimate
25 point, that, look, consent can't be you're forcing me to do

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1 this.

2 Well, you know, as they say, you know, 40 years ago,
3 when I used to drive my car, I didn't have to wear seatbelt.
4 Now, to get in the car to drive my car, I have to consent to
5 put on a seatbelt. All right? So the question is not whether
6 or not seatbelt jurisdiction has been expanded. The question
7 is, look, if I don't want to wear a seatbelt, then I shouldn't
8 get in the car.

9 So the question here is, all right, is it critical to
10 your argument that I define this as Congress changing the
11 definition of jurisdiction or somehow expanding jurisdiction,
12 or is this a more limited analysis of whether or not this is an
13 appropriate definition of consent, and whether or not the kinds
14 of constitutional analysis that one has to go through to
15 determine the assertion of jurisdiction, whether or not this
16 Court or any court has to go through that same analysis in
17 determining whether or not this is a valid consent.

18 MR. BERGER: So, your Honor, I think the Second
19 Circuit has given us the guideposts and has framed your
20 question. So your Honor said it's not a question of asserting
21 jurisdiction, but is it a valid exercise of deeming consent. I
22 said that's Legislative concept. It's Legislatively implied
23 consent because we all agree there's no explicit consent.

24 What the Second Circuit told us in *Brown*, it raises
25 the meta-question. It doesn't answer the granular question.

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1 Is that when there is no explicit consent, then implied consent
2 to jurisdiction must be free and voluntary. Well, that's
3 great, but what does free and voluntary mean? That's really
4 your Honor's question, what is free and voluntary? How do I
5 tell?

6 Your Honor gave me the seatbelt analogy. Right? Put
7 on the seatbelt. Well, guess what, that involves an exchange
8 of benefits, which is, you can't avail yourself of the right to
9 drive on the roads of New York State unless you are wearing a
10 seatbelt. That's the tradeoff. That's the quid pro quo and --

11 THE COURT: But the analogy you gave me earlier was,
12 well, before that, I could drive without a seatbelt. Now they
13 can't change the law and say I can't drive without a seatbelt.

14 MR. BERGER: But there's a quid pro quo, which is
15 going forward. What it said was, here's the deal, which is
16 something within our power, as the forum. It is our right, as
17 New York State, to say to you, you can't drive on our roads,
18 that's the quid pro quo.

19 THE COURT: But I don't understand why you're
20 conducting non-UN business is not that quid pro quo.

21 MR. BERGER: Your Honor, if --

22 THE COURT: Right to conduct non-UN business.

23 MR. BERGER: If it were non-UN business, then my point
24 is that is simply attaching -- I'm not disagreeing with your
25 Honor. I'm saying that's attaching an additional consequence

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1 to an existing rule that already prohibits non-UN business.

2 What I'm saying is there are ways to tell whether
3 we're engaging in non-UN business that are clean and simple,
4 one of which is that has been the rule since 1987. Whether the
5 consequence is criminal prosecution or whether the consequence
6 is jurisdiction doesn't matter. There's a consequence.

7 You can tell that there is no U.S. activity that falls
8 outside the line because there has been no enforcement, but
9 here's -- your Honor, we're all struggling for what's the test.
10 Right? We all know it has to be free and voluntary.

11 THE COURT: But would you say, on that analysis, that
12 Congress doesn't have the power to pass a law that says in the
13 future, if you want to do business in the United States, if you
14 decide to pay ransom to individuals to kill U.S. soldiers, that
15 you have to agree not to do that, or you would have to consent
16 to jurisdiction in the United States? You would say they
17 wouldn't have the power to do that?

18 MR. BERGER: I would say that they don't have the
19 power to do it in the ransom instance because the quid pro quo
20 has to be something within the power of the government to give.

21 The government does have the power to say, you can't
22 conduct non-UN activities in the United States without this
23 consequence. It doesn't have the power to say that you can't
24 do these activities overseas because, otherwise, let's look at
25 what the Second Circuit did in the first appeal here.

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1 THE COURT: But the semantics of it is the statute
2 doesn't say. The statute doesn't say -- it doesn't tell them
3 what they can do or what they can't do. It doesn't even say
4 you can't kill U.S. citizens.

5 MR. BERGER: That's right. Your Honor, I --

6 THE COURT: It says if you kill U.S. citizens, we will
7 consider that, in the future, to be your consent to being sued
8 not only for that activity but any other activity that you
9 might be able to be sued on, based on your consent to be sued
10 because you knew if you killed a U.S. citizen, that we were
11 going to assert jurisdiction. You went ahead and did it
12 anyway. What is --

13 MR. BERGER: Congress clearly does not have that power
14 under the Constitution. Take the *Daimler* case --

15 THE COURT: I don't understand why they don't have the
16 power. They don't have the power to do that in conflict with
17 constitutional due process requirements, but I just don't
18 understand your argument that they don't have the power to say,
19 if you want to do business in the United States and you're
20 going to engage in activities to kill U.S. citizens, or you
21 want to engage in activities that kills U.S. citizens, that if
22 you engage in that activity, we will consider that a consent to
23 the jurisdiction of our courts.

24 MR. BERGER: Right, and here's why Congress can't do
25 that --

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1 THE COURT: We put you on notice that we don't want
2 this activity to take place, and as you say, we don't have the
3 ability to prevent you from doing so, but if you do so, that's
4 going to be your consent to be sued for the consequences of
5 doing that, and sued generally for any other activity that you
6 might otherwise be sued for under general jurisdiction. Why is
7 that such a complicated concept?

8 MR. BERGER: It's not complicated. It's just
9 unconstitutional, and here's why --

10 THE COURT: Why is it unconstitutional, other than
11 it's due process or not?

12 MR. BERGER: It's a violation of due process because
13 it is not something that the United States government can
14 regulate and provide a benefit. Let me put this in a --

15 THE COURT: I just don't understand that.

16 MR. BERGER: Let me use a hypothetical like the one
17 your Honor had that emulates something like the *Daimler* case or
18 the *Bristol Myers* case or the like, which is, if Congress says
19 to Daimler, you make Mercedes Benz's. You sell them overseas.
20 If they have a defect in them, then you're on notice that 120
21 days from now, if an American citizen dies because you've made
22 a defective product overseas and somebody dies in an overseas
23 accident, then you can be sued in the United States for that.
24 That clearly violates the rule in *Daimler* that you cannot sue
25 them when there is no U.S. connection, and it doesn't change

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1 the due process rule just because you add the words "and you're
2 deemed to have consented to jurisdiction."

3 THE COURT: That's my question.

4 MR. BERGER: You can't do that because -- and that's
5 exactly what's going on here. Look, we all know intuitively
6 that what Congress has done here is an attempt to say, okay,
7 now I've read two different Second Circuit opinions. I'm going
8 to figure out Legislatively a way to get around both of those
9 things and get this case to where the Constitution says it
10 can't be. And our position is you can't do that just by adding
11 the words "deemed consent." How do we know?

12 THE COURT: Just articulate, from your perspective, if
13 I had to rule in your favor, if I had to articulate why this
14 violates due process, that's all I'm -- you know, that's where
15 I'm focused. Everything you say, I understand your argument,
16 but they all take me back to the same place. They all take me
17 back to a due process constitutional argument.

18 It doesn't take me to -- I'm not going to be able to
19 resolve this issue based on whether you did or didn't engage in
20 certain activities, or based on whether or not they can or
21 can't take legislation that they say they're going to assert to
22 protect the interests of citizens abroad.

23 All of that analysis is not going to determine whether
24 Congress can pass a law that says if you engage in that
25 activity, you've consented to jurisdiction.

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1 What I need to do is I need to articulate why is it
2 that you say -- and I'm not sure if there's any other real
3 constitutional argument, other than the broader constitutional
4 argument -- that it violates due process. I'm having
5 difficulty articulating why it violates due process, and let me
6 simplify it for you by simple analysis. I'm having more
7 difficulty articulating why it's unfair to make that a
8 requirement.

9 MR. BERGER: And I think fairness --

10 THE COURT: The notice and having given you the
11 opportunity to make your choice as to whether or not you want
12 to continue to engage in this activity. Because if you are
13 going to continue to engage in this activity, we're no longer
14 going to give you the benefit of the personal jurisdictional
15 protection that you might otherwise have because you're doing
16 this, even though we have made it clear to you if you do this,
17 it will constitute consent.

18 MR. BERGER: Okay. So, your Honor, in the latter part
19 of your analysis, you said we will no longer give you the
20 benefit of constitutional due process, and clearly Congress --

21 THE COURT: I didn't say that. The benefit of
22 constitutional due process.

23 MR. BERGER: Right. So here's --

24 THE COURT: I'm going to give you the benefit of
25 engaging in that activity and, at the same time, protecting you

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1 from being sued personally in the United States.

2 MR. BERGER: Right. So, your Honor, I think we're a
3 lot closer than perhaps you think, which is, I have one word --
4 remember like at the end of The Graduate, the movie The
5 Graduate, one word, plastic?

6 THE COURT: Plastics?

7 MR. BERGER: Plastics, right. So I've got one word
8 for you, and this is the test, reciprocity. That's the quid
9 pro quo point, the exchange-of-benefits point. The closest
10 analogy we have to this statute, and this why I harp on this
11 point, is its predecessor, ATCA.

12 ATCA was also a deemed consent statute that was
13 designed to work around the Second Circuit's decision, and the
14 only respect why the government defended its constitutionality
15 was that it recognized that there were benefits, reciprocal
16 benefits, at issue, and the government's position was the
17 political branches can impose condition on those benefits. So
18 that's the test, your Honor.

19 I understand your point. You're not going to get into
20 the granular, is this actually met or not. So the question is,
21 is there any reciprocal aspect to the PSJVT? Our argument is,
22 no, there is no reciprocity because everything that the statute
23 says -- that if you keep doing this, we will impose
24 jurisdiction -- is not something that is a benefit within the
25 power of the United States government to give. Totally unlike

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1 ATCA, where government aid or a waiver was a benefit totally
2 under the power --

3 THE COURT: I don't understand that in the context of
4 non-UN business activity.

5 MR. BERGER: Right, but so, your Honor, I agree with
6 your Honor. I would --

7 THE COURT: Congress clearly has the right to restrict
8 that or to give it unfettered, you know, condition, without
9 condition. They have the right to do that.

10 MR. BERGER: We agree on that, your Honor. If it is
11 something that the United States government can allow or
12 disallow, and the United States --

13 THE COURT: In this case, they can allow it.

14 MR. BERGER: -- and the United States government can
15 allow or disallow non-UN activity by the PLO in the United
16 States, and we know that because it already does disallow that.

17 THE COURT: Right, that is a fact.

18 MR. BERGER: Then the statute is properly analyzed on
19 a reciprocity analysis, and it becomes a fact-specific question
20 in every case about whether the activity that is involved is
21 non-UN activity.

22 But the test is still the same, which is the only
23 identifiable benefit in the PSJVTA is non-UN related business,
24 which the statute has defined broadly to include -- and this is
25 the important part about ancillary. Mr. Yalowitz skipped over

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1 this part. It says personal or official activities that are
2 ancillary to the United Nations business. That's very wrong.
3 Personal activities, why would they include the word personal?
4 So it becomes a fact-specific question.

5 So the issue is not, is there reciprocity. It's the
6 only identifiable reciprocal aspect of the statute. It becomes
7 a fact question, if that's the holding, about whether they've
8 proven facts -- and they haven't -- that then allow that
9 reciprocity to be met.

10 But you've asked me, your Honor, what is
11 fundamentally --

12 THE COURT: There's no fact question in dispute with
13 regard to whether they are meeting the condition of not paying
14 benefits to those who are convicted of --

15 MR. BERGER: Right.

16 THE COURT: -- committing what they consider to be
17 terrorist acts.

18 MR. BERGER: But our --

19 THE COURT: There's no factual dispute there.

20 MR. BERGER: That is not factually in dispute. It is
21 legally in dispute because what we are arguing is that there is
22 no reciprocity there. It is not subject to the United States
23 regulation; so therefore, there is no reciprocity, no benefit.

24 So while those facts aren't in dispute legally, we
25 strongly contest whether that's fair. We don't legally contest

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1 whether the United States can prevent non-UN-related activity
2 in the United States. That's the only identifiable benefit.

3 Your Honor keeps trying to get me to be clearer. I'm
4 trying to be. What is my test? You said it's a forced consent
5 case. How do I know whether forced consent meets due process
6 or not? And I have given you my one-word "plastics"
7 reciprocity test.

8 Now the question becomes what's reciprocity? Our
9 argument is there's no reciprocity when it comes the payments
10 that are undisputed. There is no -- there is only reciprocity
11 when it comes to non-UN-related U.S. business, but the facts
12 don't show that that is satisfied here.

13 THE COURT: You would agree that there is no
14 reciprocity requirement with regard to consent?

15 MR. BERGER: No, I think it's essential to consent. I
16 think the only way --

17 THE COURT: I mean, no. There's absolutely no
18 requirement of reciprocity, or even consideration, for
19 consenting to jurisdiction.

20 MR. BERGER: Your Honor, if it's explicit consent,
21 then, yes, the due process clause still requires that you make
22 sure. So, for example, if I explicitly consent --

23 THE COURT: Where is that?

24 MR. BERGER: If I explicitly consent, your Honor, by
25 virtue of a forum selection payment, the Court still examines

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1 whether that was a free and voluntary, non-coerced consent.

2 THE COURT: No, a free and voluntary, non-coerced is
3 not reciprocity. Okay? There's no requirement of reciprocity
4 for consent. There's a requirement that, as you said, if you
5 want to argue that it's free and voluntary, that's one thing.

6 But I don't have to say, oh, what did you get for your
7 consent? And if I can't point to something that I gave you in
8 exchange for your consent, then your consent to jurisdiction is
9 invalid. That's not a requirement for consent, as you just
10 articulated. You left out reciprocity and you said,
11 appropriately, that that has to do more with a voluntary and
12 knowing agreement.

13 MR. BERGER: So, your Honor, the question becomes what
14 is free and voluntary?

15 THE COURT: Right.

16 MR. BERGER: The reason why I say reciprocity is
17 required is that's the test for free and voluntary. It is not
18 only advanced notice.

19 THE COURT: Reciprocity has never been the test for
20 free and voluntary consent.

21 MR. BERGER: Your Honor, I respectfully suggest it has
22 always been the test.

23 THE COURT: It may be the test for a contractual
24 agreement, but I don't have to show you reciprocity in order to
25 demonstrate that you consented to something.

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1 If we signed a contract and I said, okay, we're going
2 to do X, Y and Z, and then we signed the contract and I said,
3 well, you know what, I know we said that we were both going to
4 sign this contract, but you have my consent to just take the
5 contract and keep it with you and never sign it and never send
6 it back. You're telling me that my analysis involves whether
7 or not there was some reciprocity to enforce --

8 MR. BERGER: Contract always --

9 (Indiscernible crosstalk)

10 THE COURT: -- consent?

11 MR. BERGER: Your Honor, a contract is always a
12 bargained-for exchange. It always involves reciprocities,
13 always eternal contract. You're ask me --

14 THE COURT: Consent is given with or without a
15 contract. All right? So I want to know why I'm supposed to be
16 able to say -- I understand your reciprocity argument with
17 regard to an exchange of promises. I don't see why I have to
18 sit here and try to analyze whether there was some exchange or
19 benefit in order to determine whether one party consented to
20 something.

21 MR. BERGER: Your Honor --

22 THE COURT: That's never been the analysis. That's
23 not the analysis with regard to consent.

24 MR. BERGER: But your Honor --

25 THE COURT: The analysis with regard to consent, as

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1 you said, is it was knowing and voluntary.

2 MR. BERGER: Your Honor --

3 THE COURT: I could consent to do things that I get
4 nothing in exchange for, but I may be bound by that consent.

5 MR. BERGER: Your Honor, well, here's what I think we
6 agree on, which is that free and voluntary standards have to be
7 met as a matter of due process when there's not explicit
8 consent. So we don't have explicit concept.

9 THE COURT: Okay. Well, that part of it I understand,
10 and I can understand that analysis.

11 MR. BERGER: Right. That's what *Brown* says; so that's
12 Second Circuit law, it must be free and voluntary.

13 THE COURT: Right.

14 MR. BERGER: All we're talking about now is how do you
15 sit there and say it's free and voluntary or it's not? It's
16 not a Potter Stewart thing, where you say, well, "I know it
17 when I see it" because that's not really legal rule. So the
18 question that we have been wrestling with is, what is the test
19 for free and voluntary, since we all agree it has to be free
20 and voluntary. And so --

21 THE COURT: The test for free and voluntary is that I
22 am on notice. I'm aware of the consequences. They can't force
23 me to engage in that conduct that they want to affect, and if I
24 want to engage in the conduct that they want to affect, that
25 I -- well, even from your reciprocity argument, in exchange for

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1 the right to do that, I will consent to jurisdiction.

2 In exchange for the right to give benefit to
3 individuals, I am going to agree to subject myself to
4 jurisdiction in exchange for the right to conduct business in
5 the United States that's non-UN business. I'm going to
6 knowingly and voluntarily agree to consent to jurisdiction.

7 If I don't want to consent -- non-consent doesn't mean
8 if I don't consent, I still get what I want. That's not the
9 definition of consent. Consent is, I know what's being asked
10 of me, I am conceding that point, I'm agreeing to that point,
11 and I know what the consequences are to enforcing such an
12 agreement.

13 And so if they tell me that you have to consent, it
14 will be consent to jurisdiction if you do the following acts,
15 then my voluntary decision is whether or not I'm going to do
16 that act.

17 MR. BERGER: Right. So let me be as clear about this
18 as possible because I understand where your Honor is coming
19 from, and I just need to be clear that that test for consent
20 would violate the mandate in the first appeal in this case,
21 which talked about what the standards are for consent to
22 jurisdiction.

23 It has to be more, according to the Second Circuit,
24 than advanced notice and a reasonable relationship to a
25 government goal. That's why the Second Circuit rejected the

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1 plaintiffs' consent argument in the first appeal because that
2 was the argument they made there.

3 They said the Anti-Terrorism Act puts the defendants
4 on notice that if they engage in these acts, they appoint an
5 agent for service of process, and they are served with process,
6 that's sufficient for jurisdiction. They said that was couched
7 as a consent, quote, unquote, argument by the plaintiffs in the
8 first appeal when they said due process requires something
9 more.

10 We agree, it requires something more. What I said
11 that something more is is reciprocity. Your Honor doesn't
12 agree with me, but I want to be clear about my argument because
13 I think holding that only advance notice and reasonable
14 relationship to a government goal would violate the mandate in
15 the first appeal.

16 THE COURT: I understand that. I just don't -- I
17 mean, I'll look at it again with that eye, but I don't have any
18 recollection that any court has defined it as reciprocity.

19 MR. BERGER: Well, your Honor, and that's why the only
20 other thing -- and this is the point I was making earlier that
21 I would commend to your Honor. The closest analogy we have to
22 the PSJVTA is its immediate predecessor, the ATCA, and the only
23 basis on which it's constitutionality, its due process
24 constitutionality, was defended by the U.S. government was on
25 an exchange-of-benefits theory. So that's what I would say is,

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1 you know, the closest --

2 THE COURT: Your argument is this isn't a consent;
3 that this is, in fact, an assertion of jurisdiction under the
4 guise of consent.

5 MR. BERGER: That's a fair summary, your Honor, and
6 I'm saying the reason you can tell the difference between
7 consent and an assertion of jurisdiction is whether it involves
8 reciprocity.

9 THE COURT: I want to try to wind up. Is there
10 anything else you wanted to add? Let me see if Mr. Yalowitz
11 wanted to add anything.

12 Mr. Yalowitz, you're on mute. I'm sorry,
13 Mr. Yalowitz.

14 MR. YALOWITZ: Sorry about that.

15 THE COURT: That's all right.

16 MR. YALOWITZ: I probably need about five minutes,
17 your Honor.

18 THE COURT: Okay. So I mean, do you agree with this
19 reciprocity argument?

20 MR. YALOWITZ: I agree with you, that it's never been
21 the law that consent requires reciprocity or consideration.
22 Consent is just consent. I consent. You can consent because
23 you feel like it. You can consent because you, out of the
24 goodness of your heart, want to consent. You can consent
25 because you're getting something. I've never heard of any case

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1 that says you can't consent unless you're given some benefit.

2 And by the way, while Mr. Berger was talking, I
3 searched his 60-page brief, and I didn't see anything about
4 reciprocity or quid pro quo or anything like that the 60-page
5 brief to you. He --

6 MR. BERGER: I'm happy to identify those pages if
7 Mr. Yalowitz has trouble finding them, if he's going to make a
8 waiver argument.

9 THE COURT: All right. Mr. Berger, I let you --
10 Mr. Yalowitz respond.

11 MR. YALOWITZ: Okay. Well, he didn't say -- the word
12 "reciprocity" and the word "quid pro quo" this is a new
13 argument he's making, and it's a meritless argument because
14 there's just nothing -- there's nothing in the law that says
15 you have to have a benefit. The *Bauxite* case didn't give a
16 benefit. They just said we're not giving discovery, and so
17 they said, okay, well, then you're deemed to consent. So
18 that's the first thing I want to say.

19 The second thing I want to say is, you know, I welcome
20 scrutiny of the paragraph in the Second Circuit opinion, where
21 they talked about consent. What they said was due process is
22 not satisfied in this case because the court doesn't have
23 general jurisdiction or a specific jurisdiction, and the
24 service-of-process statute doesn't change that. That's what
25 they said.

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1 They said that the statute, the service-of-process
2 statute does not answer the constitutional question of whether
3 due process is satisfied. So we're not in the
4 service-of-process statute. We're in the post-statutory
5 context. That's the other thing.

6 Now, the other thing I want to talk about, the last
7 thing I want to talk about with regard to due process is the
8 DOJ briefed in the *Klieman* case, which I really commend to the
9 Court. It's a very helpful brief, and it's not being
10 characterized fairly by the defendants.

11 I just want to read from page 14 of that brief, again
12 without belaboring it: Defendants insist that they are not at
13 home in the United States, but the "at home" test for general
14 jurisdiction is relevant only in the absence of consent. A
15 forum's ability to exercise jurisdiction by consent is separate
16 and apart from the forum's ability to exercise general or
17 specific jurisdiction over an out-of-state defendant, who has
18 not consented to suit there. So that's what the Department of
19 Justice said.

20 And then later on, in response to the defendant's
21 unconstitutional conditions test, they talked about benefits,
22 and because the unconstitutional conditions test is you can't
23 condition a benefit on the relinquishment of a constitutional
24 right unless you have a reasonable basis to do that. And, of
25 course, if you do have a reasonable basis to do that, you can.

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1 And like that's the breath test, right? If you get a
2 driver's license, you consent to a breath test if you're pulled
3 over by a cop. So I really commend the Department of Justice.
4 Don't believe what the defendants are saying about the
5 Department of Justice brief, read it. And it's very, very
6 good.

7 And the other thing I just, while I'm thinking about
8 it, Judge, for good order, you know, there is a statute, 28,
9 U.S.C., 2403, that talks about the Court notifying the Attorney
10 General if there's a constitutional question. And the Second
11 Circuit has suggested that, you know, that's a mandatory
12 requirement. You know, we did file our -- file and serve our
13 rule 5.1 statement, but I think the Court could give them that
14 notice as well, just for good order.

15 THE COURT: I have it in front of me, as a matter of
16 fact.

17 MR. YALOWITZ: Yes, okay.

18 THE COURT: It was a November 12 notice of
19 constitutional question.

20 MR. YALOWITZ: Right. Right. I gave them --

21 THE COURT: I haven't heard from them. I don't know
22 if the parties have heard from the Justice Department.

23 MR. YALOWITZ: Only that they have confirmed that they
24 received the notice.

25 THE COURT: Okay.

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1 MR. YALOWITZ: So it's not sitting in a mail room
2 somewhere.

3 THE COURT: Okay.

4 MR. YALOWITZ: But again, I think what they said about
5 the ATCA is the correct constitutional analysis. You know,
6 it's useful. It's very useful, but just for good order, I
7 think the Court could issue that, the same one that Judge
8 Furman did in the *Ford* case.

9 Okay. I also want to talk about this. This idea that
10 the defendants say the United States does not have the
11 authority to regulate conduct outside of the territorial
12 borders of the United States and, therefore, like, that's just
13 like crazy talk.

14 And I really would commend to the Court the case of
15 *Gamble against United States, Gamble against United States*,
16 which is a 2019 case from the Supreme Court, which talks about
17 how the United States has an interest in the protection of
18 human life of U.S. citizens when they're outside of the United
19 States. And a murder of a United States citizen outside of the
20 territory of the United States is not just an affront to the
21 person murdered or the family of the person murdered, it's an
22 affront to the sovereignty of the United States of America.

23 And so, you know, that comes into the interest
24 analysis. Right? Is there a legitimate -- does the United
25 States have a legitimate interest that this statute is

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1 rationally related to. That's the second thing I want to talk
2 about.

3 The final thing that I want to talk about is this
4 issue of codifying -- the PSJVTA codified the *Klinghoffer* case.
5 And those are my words, and I stand by them, and it goes to the
6 issue of the non-UN activities. And so I want to read to you
7 what Judge Stanton said in the *Klinghoffer* case. If I can find
8 it here. I want to read to you what Judge Stanton said in the
9 *Klinghoffer* case. He said -- this is his 1992 decision; so
10 this is on remand from the Second Circuit. He said -- and this
11 is really what I'm going on in my argument -- "There remain
12 other PLO activities within New York sufficiently separate from
13 its UN activities that they may be considered" -- may be
14 considered -- "in determining whether it was doing business in
15 New York within the meaning of CPLR 301. Mr. Terzi and others
16 in the PLO's New York office gave speeches and interviews every
17 month or so to live audiences and media appearances in
18 New York. The PLO's New York office purchased informational
19 pamphlets from various organizations and generated their own
20 informational materials and distributed them to those seeking
21 information about the PLO."

22 So that's what I'm going on, that that's media
23 appearances, informational materials, Judge Stanton said those
24 are not protected activities under the UN umbrella.

25 And then I want to talk about -- the last thing I want

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1 to leave you with on this, and we spent a lot of time on the
2 U.S. -- is the DC Circuit in the *Klieman* case, which now fast
3 forward to 2019, the DC Circuit is talking about *Klinghoffer*.
4 And they say Klinghoffer reasons that only those activities not
5 conducted in furtherance of the PLO's observer status may
6 properly be considered as a basis for jurisdiction, and offers
7 some examples.

8 And again, he talks about the proselytizing, speaking
9 in public every month or two to media. And then he said
10 that -- the DC Circuit says: Plaintiffs rely here on rather
11 similar promotional activities. And then they -- the final
12 thing they say is that they decided that the fact that those
13 activities were going on didn't trigger jurisdiction because
14 the ATCA was only triggered by a waiver, not a violation.

15 He says, and this is the DC Circuit: Plaintiffs would
16 equate government failure to prosecute allegedly excessive
17 propaganda activities with provision of a waiver or suspension,
18 but the statute -- that's the ATCA -- permits no such equation.
19 ATCA section 4 is triggered by a waiver, not a violation.

20 So, you know, the whole argument that, like,
21 informational materials and media appearances is just part of
22 their UN business, that's not what *Klinghoffer* held. That's
23 not what the DC Circuit said in *Klieman*.

24 And so if we agree that it was codifying that -- and
25 by the way, the best evidence I have that it was codifying

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1 prior was the statement of the sponsor right before the vote,
2 Senator Langford, who said: We're codifying prior law. So I
3 think that's pretty strong evidence.

4 So that's the piece of my argument that of the two
5 senses of ancillary, you would go to with a narrower one.

6 So if your Honor has questions about things that
7 Mr. Berger said, he said a lot of things I disagree with, but I
8 know you don't want to assume by my silence that I agree.

9 THE COURT: Sure.

10 Mr. Berger, do you have anything else you wanted to
11 add?

12 MR. BERGER: Just a couple of points, your Honor. I
13 think one thing Mr. Yalowitz and I agree on is the *Klieman*
14 brief from the Justice Department is highly instructive. It's
15 available in Westlaw at 2019 Westlaw 1200589.

16 When your Honor takes a look at pages 12 to 13 in the
17 brief, you will see that Mr. Yalowitz is incorrect, that the
18 reciprocity point is dealt with under unconstitutional
19 conditions. It's dealt with as a matter of Fifth Amendment due
20 process.

21 The last point I want to make about *Klinghoffer*, this
22 is an important one, is Judge Stanton's findings Mr. Yalowitz
23 talked about were relevant under the now-discarded
24 doing-business standard. They are not relevant under current
25 due process standards. So they provide no evidence here of

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1 whether or not the PA or PLO is subject to jurisdiction.

2 I was wondering, your Honor, if you would find it
3 helpful to have closing briefs, given how much we have thrown
4 at you in the argument. I apologize for the length of ours,
5 but we didn't get a chance, until today, to respond to his
6 reply brief. So if your Honor would find those useful, we
7 could submit simultaneous closing briefs that recap points of
8 what we have covered today, and if your Honor doesn't want
9 that, we certainly don't want to bury you in more paper.

10 THE COURT: Mr. Yalowitz?

11 MR. YALOWITZ: I don't think we need more briefs.

12 THE COURT: I don't think we do either. If something
13 that you want is of urgency and you want to submit it by
14 letter, a short letter, really less than five pages, but even
15 much less than that, then you should exchange those letters.
16 And then you should give the other side that letter before you
17 file it, and then I'll address it.

18 But I think the briefs are very complete, and this
19 argument was very helpful. I want to get the transcript. And,
20 obviously, it's not like this is a case I know nothing about.

21 MR. BERGER: That's the other thing that Mr. Yalowitz
22 and I would agree on is that your Honor knows lots and lots
23 about this case, and we appreciate your time today.

24 THE COURT: All right. Thank you, gentlemen.
25 I'll get back to you as quickly as I can.
(Adjourned)